

NULLUM CRIMEN, NULLA POENA SINE LEGE

THE PRINCIPLE OF PENAL LEGALITY IN THE *IUS VIGENS**

BRIAN T. AUSTIN, F.S.S.P.

SUMMARY — The promulgation of the 1983 Code marked a significant step forward in the struggle for the juridic protection of fundamental human rights in the Church. The last twenty-five years have witnessed a number of significant steps backward in this regard, particularly with respect to the principle of penal legality. In order to evaluate the current status of this principle, this article describes the essential elements of this principle according to the maxim *nullum crimen, nulla poena sine lege* and the disposition of the 1983 Code; and it identifies and classifies the derogations from this principle in the *ius vigens*. The author concludes that these derogations have gravely undermined the principle of penal legality and, as such, present a significant threat to the protection of fundamental human rights.

RÉSUMÉ — La promulgation du Code de 1983 fut un important pas en avant dans la lutte pour la protection juridique des droits humains fondamentaux dans l'Église. Les dernières vingt-cinq années ont témoigné d'un bon nombre de pas en arrière à cet égard, particulièrement en ce qui a trait au principe de légalité pénale. Afin d'évaluer le statut actuel de ce principe, cet article en décrit les éléments essentiels selon le maxime *nullum crimen, nulla poena sine lege* et la disposition du Code de 1983; et il identifie et classifie les dérogations à ce principe dans le *ius vigens*. L'auteur conclut que ces dérogations ont gravement nui au principe de légalité pénale et, en tant que telles, présentent une importante menace au droits humains fondamentaux.

* This article is a revised and expanded version of a paper presented at the Canadian Canon Law Society Annual Convention, Québec City, 23 October 2019.

Introduction

Reflecting upon the Church and the grave scandal of sexual abuse, Pope Emeritus Benedict XVI placed part of the blame upon what he termed a “so-called *Garantismus*, [which] meant that above all the rights of the accused had to be guaranteed, and this to such a point which in fact excluded any conviction at all.”¹ This drew a strong reaction from the current secretary at the Supreme Tribunal of the Apostolic Signatura, Bishop Giuseppe Sciacca, who replied that

... with due respect and filial affection and gratitude to Benedict XVI ... It was not at all a matter of *garantismo*—which is a category (or, better, a necessary way of being) of every healthy, fair, developed juridical system—but of the total, culpable absence of any and all recourse to a juridical remedy, particularly within canonical penal law, due to the widespread, pervasive, anti-juridical (and anti-Roman) prejudice (indeed, total ostracism) present in many and very authoritative protagonists of those years [between the Council and the 1983 Code].²

These diametrically opposed views are at the center of the current debate regarding the proper role of the principle of legality (rule of law) within the Church. This article seeks to evaluate the status of the principle of penal legality in the *ius vigens*. In order to perform this evaluation, the following three questions must be addressed. (1) What is the principle of penal legality? (2) How is this principle expressed in the *CIC*? (3) What is the current disposition of law?

1 — Penal Legality

Before coming to *penal* legality, we first need a basic definition of the principle of legality in general. Indeed, as William Daniel observed, “The

¹ BENEDICT XVI, “The Church and the Scandal of Sexual Abuse,” in *Klerusblatt* (11 April 2019), at <https://de.catholicnewsagency.com> [= BENEDICT XVI, “The Church and the Scandal of Sexual Abuse”], “... der sogenannte Garantismus ... es mußten vor allen Dingen die Rechte der Angeklagten garantiert werden und dies bis zu einem Punkt hin, der faktisch überhaupt eine Verurteilung ausschloß.”

² G. SCIACCA, “Note sulla dimissione del Vescovo dallo stato clericale,” in *JusOnline* 5, no. 2 (June 2019, 14, <https://jusvitaepensiero.mediabiblos.it/allegati/pdf/jusonline>), “... col dovuto rispetto e l’affetto di filiale gratitudine a Benedetto XVI ... Non si trattò affatto di garantismo—che è una categoria o, meglio, un modo di essere necessario di ogni sano, corretto, evoluto sistema giuridico—bensì della totale colpevole assenza di ogni e qualsivoglia ricorso ad un rimedio giuridico, segnatamente all’interno del diritto penale canonico, a causa del diffuso, pervasivo pregiudizio (anzi totale ostracismo) anti-giuridico (e antiromano) presente in tantissimi e autorevolissimi protagonisti di quegli anni.”

principle of legality ... has been given very little explicit attention by [canonists] in the English-speaking world.”³ The fundamental studies are in Italian,⁴ although many excellent studies also exist in Spanish,⁵ French,⁶ and German.⁷ In the classic formulation of Cardinal Herranz, the principle of

³ W.L. DANIEL, “The Principle of Legality in Canon Law,” in *Jur*, 70 (2010), 29-30 [= DANIEL, “Principle of Legality”].

⁴ J. HERRANZ, “Il principio di legalità nell’esercizio della potestà di governo,” in *Studi sulla nuova legislazione della Chiesa*, Monografie Giuridiche, no. 1, Milan, Giuffrè, 1990, 113-139 [= HERRANZ, “Il principio di legalità”]; I. ZUANAZZI, “Il principio di legalità nella funzione amministrativa canonica,” in *IE*, 8 (1996), 37-69; G. DI MATTIA, “Il principio di legalità nel processo penale canonico,” in ASSOCIAZIONE CANONISTICA ITALIANA (ed.), *Il diritto della Chiesa. Interpretazione e prassi*, Studi Giuridici, no. 41, Libreria Editrice Vaticana, 1996, 171-195; P. SADOWSKI, *Il principio di legalità nel diritto penale canonico*, Rome, Pontifical Gregorian University, 1999 [= SADOWSKI, *Il principio di legalità*]; F.H. LIPINSKI, *Il principio di legalità e riserva di legge nel diritto penale canonico del 1983*, Rome, Pontificia Universitas Lateranensis, 2000; G. SCIACCA, “Principio di legalità e ordinamento canonico,” in J.E. VILLA AVILA and C. GNAZI (eds.), *Matrimonium et ius: Studi in onore del Prof. Avv. Sebastiano Villeggiante*, Studi giuridici, no. 69, Libreria Editrice Vaticana, 2006, 183-194 [= SCIACCA, “Principio di legalità e ordinamento canonico”]; G. DALLA TORRE, “Qualche considerazione sul principio di legalità nel diritto penale canonico,” in *Angelicum*, 85 (2008), 267-287 [= DALLA TORRE, “Qualche considerazione”]; B. SERRA, “Sul principio di legalità nell’ordinamento canonico: profili funzionali,” in *Stato, Chiese e pluralismo confessionale*, Università degli studi di Milano (14 November 2011), 1-39, at <http://riviste.unimi.it/index.php/statoe Chiesa>; idem, “Osservazioni sul principio di legalità come idea e come metodo nell’esperienza giuridica della Chiesa,” in *Stato, Chiese e pluralismo confessionale* (1 October 2012), 1-19; idem, *Ad normam iuris: Paradigmi della legalità nel diritto canonico*, Studi di diritto canonico ed ecclesiastico: Sezione Canonistica, Turin, Giappichelli, 2018; G. SCIACCA, “Principio di legalità e diritto penale canonico,” in *Stato, Chiese e pluralismo confessionale* (25 March 2019), 1-17 [SCIACCA, “Principio di legalità e diritto penale canonico”].

⁵ J. ARIAS GÓMEZ, “El principio de legalidad en la reforma del libro V,” in *IC*, 18 (1978), 291-318 [= ARIAS GÓMEZ, “El principio de legalidad”]; idem, “Revocación, irretroactividad y derechos adquiridos,” in *IC*, 21 (1981), 723-738; J. FORNÉS DE LA ROSA, “Legalidad y flexibilidad en el ejercicio de la potestad eclesiástica,” in *IC*, 38 (1998), 119-145; J. GONZÁLEZ ARGENTE, “La norma general penal (c. 1399), ¿una excepción al principio *Nulla poena sine lege poenali* praevia?” in *Anuario de derecho canónico*, 3 (2014), 53-72; P. SOLÁ GRANELL, “Alcance del principio de legalidad en el Código de derecho canónico de 1983,” in *Anuario de derecho canónico*, 4 (2015), 201-221.

⁶ R. TORFS, “La rétroactivité des peines canoniques,” in *RDC*, 56 (2006), 185-199 [= TORFS, “La rétroactivité”]; D. LE TOURNEAU, “L’interprétation du droit fondamental des fidèles a être jugés selon le droit: c. 221 § 3,” in *Forum Canonicum*, 7 (2012), 155-173; P. TOXÉ, “Quel principe de légalité en droit canonique?” in *AC*, 56 (2014), 229-248.

⁷ B. EICHOLT, *Geltung und Durchbrechungen des Grundsatzes “Nullum crimen nulla poena sine lege” im kanonischen Recht, insbesondere in c. 1399 CIC*, Adnotationes in ius canonicum, no. 39, Frankfurt am Main, Peter Lang, 2006 [= EICHOLT, *Geltung*]. Eicholt’s bibliography is excellent, if now somewhat dated (ibid., xviii-xl).

legality means “the submission of authority to the law in the exercise of power, in a manner that avoids both the abuse of power as well as an attitude which refuses to exercise authority.”⁸ The *Oxford English Dictionary* defines “legality” as “attachment to or observance of the law;”⁹ or “the quality of being legal or in conformity with the law; lawfulness.”¹⁰ Adding a slight nuance to this second definition, Daniel defines “legality” as “the extent to which a certain action conforms to the law.”¹¹ Daniel’s definition is sufficient for our purposes here. Taken in this sense, then, the principle of legality applies to all three functions of the power of governance: legislative, administrative, and judicial.

According to Herranz, the principle of penal legality “immediately evokes” the maxim *nullum crimen, nulla poena sine lege*.¹² Authors generally agree that this maxim was first formulated in these terms by Feuerbach for the Bavarian Criminal Code of 1813,¹³ but its roots are in Roman law and the natural law itself.¹⁴ Ulpian formulated it thus: “No penalty is to be imposed, except that which is established specifically for an actual delict by

⁸ HERRANZ, “Il principio di legalità,” 120-121. “Intendiamo per principio di legalità la sottomissione dell’autorità al diritto nell’esercizio del potere, in modo da evitare tanto l’abuso di potere quanto l’atteggiamento rinunciatorio nell’esercizio dell’autorità.” This definition is quoted in, i.a., DANIEL, “Principle of Legality,” 31; and SADOWSKI, *Il principio di legalità*, 52.

⁹ *Oxford English Dictionary* [= *OED*], s.v. “legality.” According to the *OED*, this first sense is first attested to in written English ca. 1460. According to Lewis and Short, the Latin adjective *legalis* is post-Augustan, and is first attested to ca. 35-100. *Latin Dictionary*, s.v. “legalis.”

¹⁰ *OED*, s.v. “legality.” According to the *OED*, this second sense is first attested to in written English ca. 1533.

¹¹ DANIEL, “Principle of Legality,” 31.

¹² HERRANZ, “Il principio di legalità,” 116. “Il concetto di *legalità* evoca immediatamente il postulato *nulla poena sine lege*.”

¹³ P.J.A.R. VON FEUERBACH, “The Foundations of Criminal Law and the *nullum crimen* Principle,” in *Journal of International Criminal Justice*, 5, no. 4 (2007), 1005; J. HALL, “Nulla poena sine lege,” in *The Yale Law Journal*, 47, no. 2 (1937), 169-170 [= HALL, “Nulla poena sine lege”]; F.E. ADAMI, “Il diritto penale canonico e il principio *nullum crimen, nulla poena sine lege*,” in *EIC*, 45 (1989), 139-140; SADOWSKI, *Il principio di legalità*, 40-41; M. BOOT, *Genocide, Crimes against Humanity, War Crimes: Nullum crimen sine lege and the Subject Matter Jurisdiction of the International Criminal Court*, School of Human Rights Research Series, no. 12, Antwerp, Intersentia, 2002, 84 [= BOOT, *Genocide*]; R.A. KOK, *Statutory Limitations in International Criminal Law*, The Hague, T.M.C. Asser Press, 2007, 248; T. RAUTER, *Judicial Practice, Customary International Criminal Law and nullum crimen sine lege*, Cham, Springer International Publishing, 2017, 19-20. Sciacca seems to go too far when he calls it an “antico, intramontabile effato.” SCIACCA, “Principio di legalità e diritto penale canonico,” 10.

¹⁴ On the foundation of this principle in the natural law, see G. DALLA TORRE, “Qualche considerazione,” 286.

means of a law [*lex*] or some other norm [*ius*].”¹⁵ “Whereas *nullum crimen sine lege* addresses the punishability of the conduct in question, *nulla poena sine lege* deals with the legality of the ... penalty itself.”¹⁶ These general expressions of penal legality are further elaborated in the doctrine in terms of four essential elements:

(1) the principle of non-retroactivity (*nullum crimen, nulla poena sine lege praevia*); (2) the prohibition against analogy (*nullum crimen, nulla poena sine lege stricta*); (3) the principle of certainty (*nullum crimen, nulla poena sine lege certa*); and (4) the prohibition against ... unwritten ... criminal provisions (*nullum crimen, nulla poena sine lege scripta*). In sum, this means that an act can be punished only if, at the time of its commission, the act was the object of a valid, sufficiently precise, written criminal law to which a sufficiently certain sanction was attached.¹⁷

For the sake of interpretative context, let us consider briefly the following three formulations of the principle of penal legality. In the first place, the 1948 *Universal Declaration of Human Rights (UDHR)* formulated it thus: “No one shall be held guilty of any penal offence on account of any act or omission which did not constitute a penal offence, under national or international law, at the time when it was committed. Nor shall a heavier penalty be imposed than the one that was applicable at the time the penal offence was committed.”¹⁸ Secondly, this text was subsequently adopted as article 7 § 1 of the *European Convention on Human Rights (ECHR)*¹⁹ in a slightly modified form: the latter text uses the phrase “criminal offence” rather than “penal offence.” As such, both the *UDHR* and *ECHR* have adopted a principle of strict penal legality.

¹⁵ *Digesta*, in T. MOMMSEN (ed.), *Corpus iuris civilis*, vol. 1 (1889) [hereafter *Dig.*], 50.16.131.1. “Ulpianus. Poena non irrogatur, nisi quae quaque lege vel quo alio iure specialiter huic delicto imposita est.” For a number of similar passages in the *Corpus iuris civilis*, see HALL, “Nulla poena sine lege,” 166; cf. R.E. JENKINS, “*Nullum crimen, nulla poena sine lege*: The Principle of Legality in Modern Canonical Theory and Practice,” in R.J. KASLYN (ed.), *Essays in Honor of Sister Rose McDermott, S.S.J.*, *Institutiones Iuris Ecclesiae*, no. 1, Washington, DC, Catholic University of America, 2010, 371 [= JENKINS, “*Nullum crimen*”].

¹⁶ S. DANA, “Beyond Retroactivity to Realizing Justice: A Theory on the Principle of Legality in International Criminal Law Sentencing,” in *The Journal of Criminal Law & Criminology*, 99 (2009), 859.

¹⁷ *Max Planck Encyclopedia of Public International Law*, s.v. “Nulla poena nullum crimen sine lege,” at <http://opil.ouplaw.com>.

¹⁸ UNITED NATIONS, GENERAL ASSEMBLY, *Universal Declaration of Human Rights*, 10 December 1948, art. 11 § 2, at <http://www.un.org/en/documents> [hereafter *UDHR*].

¹⁹ COUNCIL OF EUROPE, *European Convention on Human Rights*, 4 November 1950, art. 7 § 1 Strasbourg, Council of Europe, 1950 [= *ECHR*].

Thirdly, the *Rome Statute of the International Criminal Court*²⁰ is also relevant here. Of particular interest is the fact that its formulation of *nullum crimen, nulla poena sine lege* is located in the section of the statute entitled “General Principles of Criminal Law.” These are clearly substantive provisions incapable of derogation. Because of their importance in international law and their relevance for our study,²¹ the three articles deserve to be quoted in full.

Article 22 *Nullum crimen sine lege* 1. A person shall not be criminally responsible under this Statute [*scripta*] unless the conduct in question constitutes, at the time it takes place [*praevia*], a crime within the jurisdiction of the Court. 2. The definition of a crime shall be strictly construed [*stricta*] and shall not be extended by analogy. In case of ambiguity [*certa*], the definition shall be interpreted in favour of the person being investigated, prosecuted or convicted.

Article 23 *Nulla poena sine lege* A person convicted by the Court may be punished only in accordance with this Statute.

Article 24 Non-retroactivity *ratione personae* 1. No person shall be criminally responsible under this Statute for conduct prior to the entry into force of the Statute. 2. In the event of a change in the law applicable to a given case prior to a final judgement, the law more favourable to the person being investigated, prosecuted or convicted shall apply.

As of 19 September 2019, 122 countries (63%) are state parties to the statute.²²

2 — Penal Legality in the CIC

This section will present the principle of penal legality as established by the *CIC* according to the four essential elements of the maxim outlined above. Sadowski (1999), Lipiński (2000), and Eicholt (2006) have published detailed studies of the precise ways in which these elements are expressed in the *CIC*, so we do not need to repeat their extensive labours

²⁰ UNITED NATIONS, S. GENERAL, multilateral agreement no. 38544, *Rome Statute of the International Criminal Court*, 17 July 1998, *Treaty Series* 2187, New York, United Nations, 2004. For a detailed study of the *Rome Statute*, see M. BOOT, *Genocide*.

²¹ On the importance of establishing a system of international system of penal law, see PIUS XII, allocution to attendees of the Sixth International Convention of Penal Law, 3 October 1953, in *AAS*, 45 (1953), 730-744.

²² For a regularly updated list of signatories and states parties, see <https://asp.icc-cpi.int/enmenus/asp/states>. The United States of America signed the *Rome Statute* on 31 December 2000 but declared its intention not to become a party to the treaty on 6 May 2002. See <https://treaties.un.org>.

here. Nevertheless, a synthetic overview of the results of their studies is necessary in order correctly to understand and evaluate the *ius vigens*.

Nullum crimen sine lege finds general expression in canon 1321 § 1: “No one is punished, unless the external violation of a law [*lex*] or precept which has been committed by the person is gravely imputable on account of malice or negligence.”²³ *Nulla poena sine lege* finds general expression in canon 221 § 3: “The Christian faithful have the right not to be punished with canonical penalties except according to the norm of law [*lex*].”²⁴ Since these canons are constitutive laws,²⁵ they are not able to be dispensed.²⁶

Although an account of the drafting of canon 221 § 3 is beyond the scope of this study,²⁷ three versions²⁸ of canon 21 of the *Lex Ecclesiae fundamentalis* (LEF)²⁹ highlight an important tension in the code between the terms *ius* and *lex*. The 1971 version had read: “No one can be punished except in cases defined in the law [*lex*] itself and in the manner determined by the same.”³⁰ The 1977 version had read: “The Christian faithful have the right not to be punished with canonical penalties except according to the norm of law [*ius*].”³¹ Finally, the 1980 version read: “The Christian faithful have the right not to be punished with canonical penalties except according to the

²³ CIC, c. 1321 § 1. “Nemo punitur, nisi externa legis vel praecepti violatio, ab eo commissa, sit graviter imputabilis ex dolo vel ex culpa.” Compare CIC/17, c. 2195 § 1. “Nomine delicti, iure ecclesiastico, intelligitur externa et moraliter imputabilis legis violatio cui addita sit sanctio canonica saltem indeterminata.” For the relationship between these two canons, see SADOWSKI, *Il principio di legalità*, 106-108; and EICHOLT, *Geltung*, 44.

²⁴ CIC, c. 221 § 3. “Christifidelibus ius est, ne poenis canonicis nisi ad normam legis plectantur.”

²⁵ See J.M. HUELS, “Categories of Indispensable and Dispensable Laws,” in *StC*, 39 (2005), 50.

²⁶ CIC, c. 86. “Dispensationi obnoxiae non sunt leges quatenus ea definiunt, quae institutorum aut actuum iuridicorum essentialiter sunt constitutiva.”

²⁷ For the various versions of the texts presented in parallel columns, see E.N. PETERS (ed.), *Incrementa in progressu 1983 Codicis iuris canonici*, Gratianus Series, Montréal, Wilson & Lafleur, 2005, 160.

²⁸ For the various versions of the texts presented in parallel columns, see O.G.M. BOELENS, *Synopsis Lex Ecclesiae Fundamentalis*, Leuven, Peeters, 2001, 34-35.

²⁹ Two fundamental studies are D. CENALMOR PALANCA, *La ley fundamental de la Iglesia: historia y análisis de un proyecto legislativo*, Colección Canónica de la Universidad de Navarra, Pamplona, Ediciones Universidad de Navarra, 1991; O.G.M. BOELENS, “De *Lex Ecclesiae Fundamentalis*: een gemiste kans of een kansloze misser?” Zeist, Katholieke Theologische Universiteit te Utrecht, 2002.

³⁰ PONTIFICIA COMMISSIO CODICI IURIS CANONICI RECOGNOSCENDO, *Schema Legis Ecclesiae Fundamentalis textus emendatus cum relatione de ipso schemate deque emendationibus receptis*, Vatican City, Typis polyglottis Vaticanis, 1971, c. 21. “Nemo puniri potest nisi in casibus ipsa lege definitis atque modo ab eadem determinato.”

³¹ *Comm*, 9 (1977), 284. “Christifidelium ius est ut poenis canonicis non plectantur nisi ad normam iuris.”

norm of law [*lex*].”³² As the 1980 version was ultimately promulgated as canon 221 § 3, it is important to keep in mind that, according to this canon, penalties can only be imposed or declared *ad normam legis*, not *ad normam iuris*. In other words, canonical crimes and penalties can only be established by a *lex*—a promulgated norm of *legislative* power—and not by a *ius*—a much broader term which includes acts of *executive* power.

2.1 — *Lex*

Nullum crimen, nulla poena sine lege establishes that only a law (*lex*) can define delicts or establish penalties. A certain naïve reading of canon 221 § 3 might suggest that this principle was strictly adopted in the *CIC*: “The Christian faithful have the right not to be punished with canonical penalties except according to the norm of law [*lex*].”³³ Other canons, however, weaken the force of canon 221 § 3 in significant ways. In the first place, canons 1319 and 1321 establish that delicts and penalties can also be *threatened* (although not constituted) by precept [*praeceptum*]. Unlike laws, penal precepts—a species of singular administrative decree³⁴—are acts of *executive* power that may be threatened by authorities who “can impose precepts by virtue of the power of governance in the external forum” (c. 1319 § 1).³⁵ Secondly, canon 1399 allows for external violations of divine or canon law to be punished “when the special gravity of the violation demands punishment and there is an urgent need to prevent or repair scandals.”³⁶

2.2 — *Lex scripta*

Nullum crimen, nulla poena sine lege scripta establishes that only a *written* law (*lex scripta*) can define delicts or establish penalties. The canonical system, however, requires that laws [*leges*] be *promulgated* (c. 7), not that they be *written*; nevertheless, the normal means of promulgation is of course

³² PONTIFICIA COMMISSIO CODICI IURIS CANONICI RECOGNOSCENDO, *Lex Ecclesiae Fundamental*, 24 April 1980, Vatican City, Typis polyglottis Vaticanis, 1980 [= *LEF*/1980], c. 21. “Christifidelibus ius est ne poenis canonicis nisi ad normam legis plectantur.”

³³ *CIC*, c. 221 § 3. “Christifidelibus ius est, ne poenis canonicis nisi ad normam legis plectantur.”

³⁴ SADOWSKI, *Il principio di legalità*, 109.

³⁵ Besides all legislators, these authorities are all ordinaries and their delegates (within the limits of their mandate) and the major dicasteries of the Roman Curia. See Josemaría SANCHIS, commentary on c. 1319 in *Exegetical Comm*, vol. 4, 250–251.

³⁶ *CIC*, c. 1399. “Praeter casus hac vel aliis legibus statutos, divinae vel canonicae legis externa violatio tunc tantum potest iusta quidem poena puniri, cum specialis violationis gravitas punitorem postulat, et necessitas urget scandala praeveniendi vel reparandi.”

through written publication (c. 8).³⁷ The *ratio legis* is that an unwritten penal law, although valid, would not be enforceable in the external forum. Similarly, a penal precept is also to be given in writing (cc. 37 and 51).³⁸ This requirement, however, is not for the *validity* (c. 10) of the penal precept but rather is for its *liceity* and *enforceability* in the external forum (c. 54 § 2). It is clear, therefore, that *nullum crimen, nulla poena sine lege scripta* was adopted in the canonical system only in a weakened form.

2.3 — *Lex certa*

Nullum crimen, nulla poena sine lege certa requires the legislator to provide definitions of delicts and penalties which are both taxative and clear.³⁹ It is, of course, in the best interest of the legislator—as well as of the common good—that *all* laws (not only penal laws) be expressed in clear language, since doubtful laws cause confusion and also do not oblige.⁴⁰ Eicholt, having examined each delict as defined in the *CIC* in detail,⁴¹ concludes fairly that most delicts “are clear and sufficiently determined.”⁴² Even the extremely flexible and often-criticized general penal norm of canon 1399 explicitly requires “an external violation of a divine or canonical law”⁴³ in order to be applied, and so is able to be harmonized—if with difficulty—with canon 221 § 3.⁴⁴ The *CCEO*, on the other hand, did not include a general penal norm, and so adopted the principle of *lex certa* in a more rigorous form than that of the *CIC*.⁴⁵

³⁷ B. EICHOLT, *Geltung*, 46-47.

³⁸ For the oral procedure to be followed in exceptional circumstances, see *CIC*, c. 55.

³⁹ T.J. GREEN, “Clerical Sexual Abuse of Minors: Some Canonical Reflections,” in *Jur*, 63 (2003), 384.

⁴⁰ *CIC*, c. 14. “Leges, etiam irritantes et inhabilitantes, in dubio iuris non urgent.”

⁴¹ B. EICHOLT, *Geltung*, 87-100.

⁴² *Ibid.*, 100. “Die meisten Straftatbestände des VI. Buches des *CIC* sind eindeutig und hinreichend bestimmt gefasst.”

⁴³ *CIC*, c. 1399. “Praeter casus hac vel aliis legibus statutos, divinae vel canonicae legis externa violatio tunc tantum potest iusta quidem poena puniri, cum specialis violationis gravitas punitionem postulat, et necessitas urget scandala praeveniendi vel reparandi.”

⁴⁴ DALLA TORRE, “Qualche considerazione,” 275-276. For an analysis of canon 1399, see SADOWSKI, *Il principio di legalità*, 116-133. For detailed studies of the legality of c. 1399 and of its relationship with c. 221 § 3, see *ibid.*, 175-252; and EICHOLT, *Geltung*.

⁴⁵ Di Mattia, reflecting at some length upon this discrepancy between the two codes, concludes that “the position of the Latin code must be rethought.” G. DI MATTIA, “La riserva della legge penale nel *Codex Iuris Canonici* nel *Codex Canonum Ecclesiarum Orientalium*: armonica o conflittuale legislazione?” in J.I. ARRIETA and G.P. MILANO (eds.), *Metodo, fonti e soggetti del diritto canonico*, Libreria editrice Vaticana, 1999, 624. This article is nearly identical to *idem*, “Equità e riserve di legge nel diritto penale canonico (Cann. 221 § 3 e 1399),” in *Ap*, 69 (1996), 583-611.

Regarding the certainty of the *penalties* established by law, on the other hand, authors are more reserved. If the *CIC/17* was perhaps too rigid in this regard, the *CIC* is perhaps too flexible. Judicial discretion in the imposition of penalties is laudable;⁴⁶ the current law and praxis, however, raise questions regarding what may appear as arbitrary or unfair treatment. The 2011 proposed revision of Book VI sought to correct this deficiency by rendering many facultative and/or indeterminate penalties preceptive and/or determinate.⁴⁷

2.4 — *Lex stricta*

Nullum crimen, nulla poena sine lege stricta requires penal laws to be interpreted strictly. This principle is also referred to in the literature as the prohibition of analogy.⁴⁸ This principle is strongly expressed in canons 18 and 19. Canon 18 requires that “Laws which establish a penalty or restrict the free exercise of rights or contain an exception to the law are subject to strict interpretation.”⁴⁹ Moreover, canon 19 establishes that if there is a gap in the law regarding a certain penal matter, the gap may not be filled by means of recourse to analogous laws, general principles of law, or even the jurisprudence and praxis of the Roman curia.⁵⁰ Similarly, penal precepts are subject to strict interpretation (c. 36 § 1) and cannot be extended to analogous cases (c. 36 § 2).

2.5 — *Lex praevia*

Nullum crimen, nulla poena sine lege praevia requires penal laws which are unfavourable to the accused to be prospective rather than retrospective; that is to say, penal laws unfavourable to the accused cannot be applied retroactively. This prohibition in penal law is absolute and therefore is much stricter than the general prohibition of retroactivity of canon 9: “Laws regard

⁴⁶ SADOWSKI, *Il principio di legalità*, 113; EICHOLT, *Geltung*, 104-105.

⁴⁷ See PONTIFICAL COUNCIL FOR LEGISLATIVE TEXTS, *Schema recognitionis Libri VI Codicis Iuris Canonici (reservatum)*, Vatican City, Typis polyglottis Vaticanis, 2011; T.J. GREEN, “Initial Reflections on the *Schema recognitionis Libri VI Codicis iuris canonici*,” in *StC*, 50 (2016), 11-12; 19 [= GREEN, “Initial Reflections”]. As of this writing, the opinion among knowledgeable canonists is that the proposed revision will not be promulgated in its present form.

⁴⁸ SADOWSKI, *Il principio di legalità*, 115-116.

⁴⁹ *CIC*, c. 18. “Leges quae poenam statuunt aut liberum iurium exercitium coarctant aut exceptionem a lege continent, strictae subsunt interpretationi.”

⁵⁰ *CIC*, c. 19. “Si certa de re desit expressum legis sive universalis sive particularis praescriptum aut consuetudo, causa, nisi sit poenalis, dirimenda est attentis legibus latis in similibus, generalibus iuris principiis cum aequitate canonica servatis, iurisprudentia et praxi Curiae Romanae, communi constantique doctorum sententia.”

the future, not the past, unless they expressly provide for the past.”⁵¹ This general prohibition of retroactivity is an ancient principle of both Roman and canon law.⁵² Penal laws which are *favourable* to the accused, however, are applied retroactively. This corollary to *nullum crimen, nulla poena*—sometimes referred to in the literature as the principle of *lex mitior* (“the milder law”) or *lex favorabilior* (“the more favourable law”)—finds expression in canon 1313. The first paragraph of canon 1313 states that “If a law [*lex*] is changed after the commission of a delict, the law more favourable to the accused must be applied.”⁵³ Further, “If a later law [*lex*] abolishes a law or at least the penalty, the penalty immediately ceases.”⁵⁴ Canons 9 and 1313 are clear in themselves and present no particular difficulties of interpretation.

There is, however, a way of circumventing these canons. As Torfs reminds us, “The executive power has a way out—namely, the technique of penal precept”⁵⁵ (c. 1319 § 1). That is to say, the penal *precept*, if employed in conjunction with canon 273, can be manipulated so as to obtain the same *effect* as a retroactive penal *law*. The necessary steps to employ this technique are the following.⁵⁶ (1) A cleric is engaged in some external behaviour which, although not an external violation of any divine or canonical law (c. 1399), displeases his ordinary. (2) His ordinary, deeming it “truly necessary to provide more suitably for ecclesiastical discipline” (c. 1317), threatens a determinate penalty by precept (c. 1319 § 1), reminding the cleric of his “special obligation ... to show reverence and obedience to his proper ordinary” (c. 273). (3) If the cleric refuses to change his behaviour, the ordinary may impose the penalty. Using this technique, a cleric may effectively be punished retroactively for behaviour which is not in itself either sinful or criminal.⁵⁷

⁵¹ *CIC*, c. 9. “Leges respiciunt futura, non praeterita, nisi nominatim in eis de praeteritis caveatur.” Cf. the identical *CIC/17*, c. 10 and its *fontes*.

⁵² *Liber extra*, in Emil FRIEDBERG (ed.), *Corpus iuris canonici*, vol. 2, Leipzig, Bernhard Tauchnitz, 1879 [= X], 1.2.13. “Constitutio futura respicit, et non praeterita, nisi in ea de praeteritis caveatur;” cf. *Codex Iustinianus*, in P. KRÜGER, *Corpus iuris civilis*, 5th ed., vol. 2, Berlin, Weidmann, 1892 [= *Cod.*], 1.14.7. “Imperatores Theodosius, Valentinianus (5 April 440). Leges et constitutiones futuris certum est dare formam negotiis, non ad facta praeterita revocari, nisi nominatim etiam de praeterito tempore adhuc pendentibus negotiis cautum sit.”

⁵³ *CIC*, c. 1313 § 1. “Si post delictum commissum lex mutetur, applicanda est lex reo favorabilior.” Cf. *CIC/17*, cc. 2219 § 1 (and its *fontes*) and 2226 § 2.

⁵⁴ *CIC*, c. 1313 § 2. “Quod si lex posterior tollat legem vel saltem poenam, haec statim cessat.” Cf. *CIC/17*, c. 2226 § 3.

⁵⁵ TORFS, “La rétroactivité,” 194. “Le pouvoir exécutif dispose d’une porte de sortie, à savoir la technique du précepte pénal.”

⁵⁶ *Ibid.*, 194–195.

⁵⁷ This technique can also be applied to other members of the Christian faithful in virtue of c. 1371, 2°.

In short, of the four constitutive elements of *nullum crimen, nulla poena sine lege*, only one is strongly expressed in the *CIC*: the prohibition of analogy (*lex stricta*). On the other hand, the elements requiring penal laws to be written (*lex scripta*), sufficiently determined (*lex certa*), and prospective (*lex praevia*), while present, are expressed in an attenuated sense admitting of exceptions to the general rule. Since the *CIC* allows for penalties to be imposed due to a violation of penal law as well as a penal precept, we must agree with Arias Gómez that a more technically precise formulation of the principle of penal legality in canon law would be “*nullum crimen, nulla poena sine norma poenali praevia*.”⁵⁸

3 — Penal Legality in the *ius vigens*

If it “is fair to describe the approach to canon law in the several decades immediately prior to Vatican II as sometimes manifesting characteristics of legalism,”⁵⁹ it is also fair to describe the approach “during several decades that followed” as manifesting characteristics of antinomianism.⁶⁰ Indeed, it is not too much to say that the Church experienced a real “crisis of law”⁶¹ during the twenty-five years between Pope John’s announcement of the council and the promulgation of the 1983 code.⁶² It should also be noted that, “in the twenty years from 1960 to 1980, the previously normative standards in matters of sexuality utterly collapsed.”⁶³ One of the most egregious effects of this crisis was that “the bishops, in fact, hardly ever applied the penalties

⁵⁸ ARIAS GÓMEZ, “El principio de legalidad,” 307.

⁵⁹ J.J. COUGHLIN, “Antinomianism and Legalism in Canon Law,” *Notre Dame Law School Legal Studies Paper No. 11-15* (5 April 2011), 12, at <http://ssrn.com/abstract1799475> [= COUGHLIN, “Antinomianism”].

⁶⁰ *Ibid.*, 3, 13. Brian Tierney observed at the time that “in some quarters, the very word ‘juridical’ has come to be accepted as a conventional term of abuse.” B. TIERNEY, “Medieval Canon Law and Western Constitutionalism,” in *The Catholic Historical Review*, 52, no. 1 (1966), 1.

⁶¹ For a magisterial analysis of this crisis, see J. HERRANZ, “Renewal and Effectiveness in Canon Law,” in *StC*, 28 (1994), 5-12.

⁶² For an overview of the developments in penal law between 1967 and 1983, see S. LOPPACHER, *Processo penale canonico e abuso sessuale su minori: Un’analisi dei recenti sviluppi normativi intorno al “delictum contra sextum cum minore” alla luce degli elementi essenziali di un giusto processo*, Dissertationes Series Canonica, no. 50, Rome, Pontificia Universitas Sanctae Crucis, 2017, 18-21 [= LOPPACHER, *Processo penale canonico*].

⁶³ BENEDICT XVI, “The Church and the Scandal of Sexual Abuse.” “Man kann sagen, daß in den 20 Jahren von 1960 [bis] 1980 die bisher geltenden Maßstäbe in Fragen Sexualität vollkommen weggebrochen sind.”

envisioned by canon law.”⁶⁴ Eschewing canonical penalties as outdated manifestations of coercive power incompatible with evangelical charity, the *Zeitgeist* lauded so-called “pastoral” or “therapeutic” measures as the fitting response to clerics accused of grave (and even heinous) crimes.⁶⁵ This antinomian approach has, of course, resulted in enormous harm.⁶⁶

It was at the height of this crisis of law, on the very eve of the promulgation of the 1983 code, that the cardinal-archbishop of Munich and Freising entered upon the scene.⁶⁷ On 25 November 1981, Pope John Paul II appointed Joseph Cardinal Ratzinger prefect of the Sacred Congregation for the Doctrine of the Faith (as it was then still called). Over the course of the next four decades, Ratzinger would play a “crucial [and] decisive”⁶⁸ role in the development of penal law, first as prefect (1981–2005) and then as pope (2005–2013). In an official letter dated 19 February 1988, Ratzinger had

⁶⁴ K.E. BOCCAFOLA, “The Special Penal Norms of the United States and Their Application,” in P.M. DUGAN (ed.), *The Penal Process and the Protection of Rights in Canon Law*, Montreal, Wilson & Lafleur, 2005, 258 [= BOCCAFOLA, “Special Penal Norms”]. This fact is well known and attested to by many authors. See, for example, W.H. WOESTMAN, *Ecclesiastical Sanctions and the Penal Process: A Commentary on the Code of Canon Law*, 2nd ed., Ottawa, Saint Paul University, 2003 [= WOESTMAN, *Ecclesiastical Sanctions*], xv; COUGHLIN, “Antinomianism,” 11; C.J. SCICLUNA, “Response to and Prevention of Clerical Sexual Misconduct: Current Praxis,” in *Origins*, 43 (2013), 358 [= SCICLUNA, “Response”]; LOPPACHER, *Processo penale canonico*, 371.

⁶⁵ BOCCAFOLA, “Special Penal Norms,” 258–261; N.P. CAFARDI, *Before Dallas: The U.S. Bishops’ Response to Clergy Sexual Abuse of Children*, Mahwah, NJ, Paulist Press, 2008; J.I. ARRIETA, “Cardinal Ratzinger’s Influence on the Revision of the Canonical Penal Law System,” in *Origins*, 40 (2010), 495 [=ARRIETA, “Cardinal Ratzinger’s Influence”]; COUGHLIN, “Antinomianism,” 1418.

⁶⁶ For statistics concerning the sexual abuse of minors committed by priests and deacons in the United States, see JOHN JAY COLLEGE OF CRIMINAL JUSTICE, *The Nature and Scope of Sexual Abuse of Minors by Catholic Priests and Deacons in the United States 1950–2002*, Washington, DC, USCCB, 2004; idem, *The Nature and Scope of Sexual Abuse of Minors by Catholic Priests and Deacons in the United States 1950–2002. 2006 Supplementary Report*, Washington, DC, USCCB, 2006; idem, *The Causes and Context of Sexual Abuse of Minors by Catholic Priests in the United States, 1950–2010*, Washington, DC: USCCB, 2011; UNITED STATES OF AMERICA, ATTORNEY GENERAL OF PENNSYLVANIA, *Report I of the 40th Statewide Investigating Grand Jury*, 27 July 2018, <https://www.attorneygeneral.gov/report>. For an interpretation of these statistics which differs from that of the USCCB, see D.P. SULLINS, “Is Catholic Clergy Sex Abuse Related to Homosexual Priests?” paper presented at the Sexually Aggressive Behavior toward pre and post Adolescent Males, Seminarians and Adults by Catholic Clergy: Prevention, Evaluation, and Responses, Ave Maria School of Law, Naples, Florida, 24–26 September 2018, <http://www.ruthinstitute.org/literature>.

⁶⁷ For an overview of the developments in penal law between 1983 and 2001, see LOPPACHER, *Processo penale canonico*, 22–32.

⁶⁸ ARRIETA, “Cardinal Ratzinger’s Influence,” 494.

already begun making inquiries “regarding the possibility of making provision in specific cases for a more rapid and simplified penal process”⁶⁹ than the one provided in the newly promulgated code. The official response of Cardinal Castillo Lara⁷⁰ deserves to be quoted at length, since it incisively articulates a point of view diametrically opposed to that of Ratzinger.

I can well understand Your Eminence’s concern at the fact that the ordinaries involved did not first exercise their judicial power in order to punish such crimes sufficiently, even to protect the common good of the faithful. Nevertheless, the problem seems to lie not with juridical procedure but with the responsible exercise of the task of governance.... At the same time the procedure has been greatly simplified in comparison with the previous norms of the 1917 code: it has been speeded up and streamlined, partly with a view to encouraging the ordinaries to exercise their authority through the necessary judgment of the offenders *ad normam iuris* and the imposition of the sanctions provided.... To seek to simplify the judicial procedure further so as to impose or declare sanctions as grave as dismissal from the clerical state or to change the current norm of Canon 1342 §2, which prohibits proceeding with an extrajudicial administrative decree in these cases (cf. Canon 1720), does not seem at all appropriate. Indeed, on the one hand it would endanger the fundamental right of defence—and in causes that affect the person’s state—while on the other hand it would favor the deplorable tendency—owing perhaps to lack of due knowledge or esteem for the law—toward ambivalent so-called “pastoral” governance, which ultimately is not pastoral at all, because it tends to obscure the due exercise of authority, thereby damaging the common good of the faithful.⁷¹

This exchange of letters between two eminent curial cardinals admirably illustrates the salient terms of the larger debate regarding the reform of penal

⁶⁹ J. RATZINGER, letter to Rosalio José Castillo Lara, cardinal-president of the Pontifical Commission for the Authentic Interpretation of the Code of Canon Law, regarding the possibility of a simplified penal process, Prot. No. 128/61 SD, 19 February 1988, 496, English translation in *Origins*, 40 (2010), 496. The entire sentence runs: “Sarei pertanto grato all’Eminenza Vostra Rev.ma se potesse far conoscere il Suo apprezzato parere circa l’eventuale possibilità di prevedere, in casi determinati, una procedura più rapida e semplificata;” original Italian text in LOPPACHER, *Processo penale canonico*, 383-384.

⁷⁰ Castillo Lara (born 4 September 1922 in Venezuela) was first secretary (12 February 1975) and then pro-president (15 May 1982) of the Pontifical Commission for the Revision of the Code of Canon Law. After the code had been promulgated, he served as the first president of the Pontifical Commission for the Authentic Interpretation of the Code of Canon Law (18 January 1984 to 5 December 1989).

⁷¹ R.J. CASTILLO LARA, letter to Joseph Ratzinger, cardinal-prefect of the CDF, regarding the possibility of a simplified penal process, Prot. No. 1605/88, 10 March 1988, English translation in *Origins*, 40 (2010), 496-497; original Italian in LOPPACHER, *Processo penale canonico*, 385-387.

law. On the one hand, impatience is expressed with procedural laws in the face of manifest injustice; on the other, concern that setting aside procedural laws by means of further-abbreviated administrative processes “would endanger the fundamental right of defence”⁷² and engender even further contempt for the law.

3.1 — Rule of Rescript Phase I

Fifteen years after this initial exchange of letters, Ratzinger’s position was growing in acceptance through successive rescripts and derogations of penal law and procedure. The first phase of this “rule of rescript” may be summarized thus: in 1994, a rescript for the United States raising the age of minority from sixteen to eighteen in cases concerning violations of the sixth commandment and authorizing prosecution of extinct criminal actions in certain cases;⁷³ in 1996, the same rescript for Ireland;⁷⁴ in 1997, a rescript authorizing the Congregation for the Evangelization of Peoples to present directly to the supreme pontiff for his approval *in forma specifica* the imposition of dismissal from the clerical state *ex officio et in poenam* in cases regulated by canons 1394 and 1395;⁷⁵ in 1998, documentation of a similar rescript for the Congregation of Divine Worship and the Discipline of the

⁷² A similar debate had taken place before the reform of matrimonial procedural law effected by FRANCIS, apostolic letter *motu proprio* reforming the canons of the Code of Canon Law concerning causes for declaring the nullity of matrimony *Mitis Iudex Dominus Iesus*, 15 August 2015, in AAS, 107 (2015), 958-970. In retrospect, the following address of Cardinal Burke regarding the necessity of strong procedural safeguards in order to ascertain the truth of a juridic fact was in fact his swan song. R.L. BURKE, “The Service of the Apostolic Signatura in the Church and the Ministry of Justice of the Diocesan Bishop,” in *Jur*, 74 (2014), 5-29.

⁷³ SECRETARIAT OF STATE, rescript *ex Audientia* for the episcopal conference of the United States to derogate *ad quinquennium* from canons 1395 § 2 and 1362 § 1, 2°, 25 April 1994 [= *Rescript/1994*], in W.H. WOESTMAN, *Ecclesiastical Sanctions*, 270-271. This rescript was subsequently extended; idem, letter extending the Rescript/1994 for ten years, 4 December 1998, in *StC*, 33 (1999), 211-212.

⁷⁴ See CONGREGATION FOR THE DOCTRINE OF THE FAITH, *Historical Introduction to the Norms of Sacramentorum sanctitatis tutela*, <http://www.vatican.va/resources>, Vatican English translation in *Origins*, 40 (2010), 152-154.

⁷⁵ CONGREGATION FOR THE EVANGELIZATION OF PEOPLES, private letter concerning dismissal from the clerical state *ex officio et in poenam*, Prot. No. 2154/97, 3 June 1997, in WOESTMAN, *Ecclesiastical Sanctions*, 275-276. The rescript itself was issued on 3 March 1997; for further details, see K. GILLESPIE, “The Special Faculties Granted to the Congregation for the Clergy for the Salvation of Souls and the Good Order of the Ecclesiastical Community: Context, Purpose and Use,” in *StC*, 48 (2014), 306-307 [= GILLESPIE, “Special Faculties”].

Sacraments;⁷⁶ finally, in 2001, the well-known apostolic letter *Sacramentorum sanctitatis tutela* (SST/2001) promulgating new substantive and procedural laws regarding delicts reserved to the CDF.⁷⁷ The period of legal certainty ushered in by SST/2001, however, was to be short-lived.⁷⁸

3.2 — Rule of Rescript Phase II

The second phase of exceptions to penal law and procedure began almost immediately: on 7 November 2002 a rescript authorizing the CDF “to derogate from the terms of prescription on a case by case basis, at the motivated request of individual bishops;”⁷⁹ on 7 February 2003, a rescript authorizing the CDF to dispense judges from the qualifications of the priestly order and the doctorate in canon law, to dispense from the requirement of a judicial penal process, and to sanate violations of procedural law by inferior tribunals;⁸⁰ on 14 February 2003, a rescript excluding recourse to the Apostolic

⁷⁶ CONGREGATION FOR DIVINE WORSHIP AND THE DISCIPLINE OF THE SACRAMENTS, private letter concerning dismissal from the clerical state *ex officio et in poenam*, Prot. No. 2169/98, 11 November 1998, in WOESTMAN, *Ecclesiastical Sanctions*, 274. For further details, see CONGREGATION FOR DIVINE WORSHIP AND THE DISCIPLINE OF THE SACRAMENTS, private letter concerning dismissal from the clerical state *ex officio et in poenam*, Prot. No. 1890/02/S, 21 October 2002, in *ibid.*, 272-273; GILLESPIE, “Special Faculties,” 307-308.

⁷⁷ JOHN PAUL II, apostolic letter *motu proprio* promulgating norms concerning the graver delicts reserved to the CDF *Sacramentorum sanctitatis tutela*, 30 April 2001, in AAS, 93 (2001), 737-739 [= SST/2001], Latin original with English translation in WOESTMAN, *Ecclesiastical Sanctions*, 300-309.

⁷⁸ For an overview of the developments in penal law between 2001 and 2010, see LOPPACHER, *Processo penale canonico*, 33-68.

⁷⁹ JOHN PAUL II, rescript *ex Audientia* authorizing the CDF to derogate from the terms of prescription, 7 November 2002 [hereafter *Rescript/2002*], in WOESTMAN, *Ecclesiastical Sanctions*, 314. “... di derogare ai termini della prescrizione, caso per caso, su motivata domanda dei singoli Vescovi.” Woestman does not cite his source for this text; to the best of this author’s knowledge, it was never officially published. Kaslyn writes: “in two private February 2003 audiences with Cardinal Ratzinger, ... John Paul II ... promulgated a specific number of emendations, dispensations, derogations and faculties. ... These ... texts are gathered together in an unpublished and unpaginated photocopy entitled *Decisiones Summi Pontificis*.” R.J. KASLYN, “Three Legal Texts and their Interconnection: an Overview,” in *Jur.*, 65 (2005), 120, fn. 2. The format of Brown’s citation, however, seems to indicate publication in Vatican City, 2002. P.J. BROWN, “Prescription and Statutes of Limitation,” in *CLSAP*, 70 (2008), 424, fn. 168. This author has written to various officials of the CDF on several occasions, but to date nothing official has yet been produced.

⁸⁰ SECRETARIAT OF STATE, rescript *ex Audientia* granting three faculties to the CDF regarding SST/2001, 7 February 2003, in WOESTMAN, *Ecclesiastical Sanctions*, 314-316; cf. CDF, rescript *ex Audientia* modifying SST/2001, 21 May 2010, arts. 15; 18; 21; in AAS, 102 (2010), 419-430 [= SST/2010].

Signatura in cases reserved to the CDF.⁸¹ Then followed, on 19 December 2008, a rescript authorizing the Congregation for the Evangelization of Peoples to present directly to the supreme pontiff for his approval *in forma specifica* the imposition of dismissal from the clerical state *ex officio et in poenam* in cases regulated by canons 1394 and 1395, and to do the same in cases regulated by canon 1399;⁸² on 30 January 2009, a similar rescript for the Congregation for the Clergy, which also authorized the administrative dismissal from the clerical state of those who have illicitly abandoned the sacred ministry for a period of at least five years.⁸³ Finally, on 21 May 2010, an updated version of SST/2001 which, *inter alia*,⁸⁴ gave the two 2003 rescripts for the CDF the force of law.⁸⁵

3.3 — Juridic Nature of the Favours Still in Force

SST/2010 left three rescripts untouched: the 2002 rescript for the CDF, the 2008 rescript for the Congregation for the Evangelization of Peoples, and the 2009 rescript for the Congregation for the Clergy. Huels demonstrated that the three “special faculties” contained in the 2009 rescript for the Congregation for the Clergy have the juridic nature of *privileges*, since “they grant the Congregation the right lawfully to act contrary to the law.”⁸⁶ For the same reasons adduced by Huels, the “special faculties” granted to the

⁸¹ SECRETARIAT OF STATE, rescript *ex Audientia* instituting the procedure of exclusive recourse internal to the CDF, 14 February 2003, in WOESTMAN, *Ecclesiastical Sanctions*, 316; cf. SST/2010, art. 27.

⁸² For further details, see CONGREGATION FOR THE EVANGELIZATION OF PEOPLES, letter on the special faculties, Prot. No. 0579/09, 31 March 2009, English translation in *SCL*, 5 (2009), 69-73; LOPPACHER, *Processo penale canonico*, 60-63.

⁸³ BENEDICT XVI, rescript *ex Audientia* granting three special faculties to the Congregation for the Clergy, 30 January 2009, in *Il Regno*, 13 (2009), 392-396. Additional procedural guidelines were subsequently issued; see CONGREGATION FOR THE CLERGY, procedural guidelines for instructing cases according to the three special faculties, Prot. No. 2010/0823, 17 March 2010, in *IE*, 23 (2011), 229-235. For an excellent analysis of these three special faculties, see GILLESPIE, “Special Faculties,” 301-329; see also LOPPACHER, *Processo penale canonico*, 63-68.

⁸⁴ For further details regarding the changes effected by SST/2010, see T.J. GREEN, “*Sacramentorum Sanctitatis Tutela*: Reflections on the Revised May 2010 Norms on More Serious Delicts,” in *Jur*, 71 (2011), 120-158; J.P. KIMES, “Considerazioni generali sulla riforma legislativa del motu proprio *Sacramentorum sanctitatis tutela*,” in Andrea D’AURIA and Claudio PAPALE (eds.), *I delitti riservati* (2014), 11-28; LOPPACHER, *Processo penale canonico*, 69-78.

⁸⁵ SST/2010, arts. 15; 18; 21; 27.

⁸⁶ J.M. HUELS, “Independent General Administrative Norms in Documents of the Roman Curia,” in *Jur*, 76 (2016), 106.

CEP are also *privileges*. This section, therefore, has only to consider the 2002 rescript.⁸⁷

Nkouaya Mbandji was the first to publish an analysis of the juridic nature of the favour granted by the 2002 rescript.⁸⁸ Relying upon the fundamental studies of Huels⁸⁹ and McCormack,⁹⁰ Nkouaya Mbandji cogently argues that, although the favour has been called a number of different things—faculty, indult, derogation, dispensation—it, too, is best classified as a *privilege*. There is no need to duplicate his excellent analysis here; nevertheless, a short resumé of his argument and conclusions will be presented, as no similar analysis has yet been published in English.

3.3.1 — *Derogation?*

In the first place, Nkouaya Mbandji observes that the 2002 rescript uses the term “derogate” in an improper sense. According to Huels, “In its usual meaning, the term ‘derogation’ refers to a partial revocation of the law. It is an act of legislative power, namely, a later law that modifies an earlier law in some way without abrogating it completely (cf. c. 20).”⁹¹ The rescript, however, does not contain any new laws,⁹² nor does it modify an earlier law; therefore, its use of *derogare* cannot be understood in this usual or proper sense. Canon 38, on the other hand, refers to a “derogating clause” contained

⁸⁷ For a more detailed account, see B.T. AUSTIN, *The Power of the Congregation for the Doctrine of the Faith to Derogate From Prescription: An Evaluation of the Legality and Justice of the 2002 Rescript*, Canon Law Monograph Series, no. 8, Leuven, Peeters, 2020 [forthcoming].

⁸⁸ V. NKOUAYA MBANDJI, *La prescription en droit canonique et dans la tradition du Code de Napoléon avec applications particulières aux délits les plus graves touchant aux mœurs*, Thèses Saint-Paul, Ottawa, Université Saint-Paul, 2018, 187-196 [= NKOUAYA MBANDJI, *La prescription*]. For a review of the published version of this excellent dissertation, see B.T. AUSTIN, “Review of Nkouaya Mbandji, Valère, *La Prescription en Droit Canonique*,” in *StC*, 52 (2018), 645-647.

⁸⁹ J.M. HUELS, “Privilege, Faculty, Indult, Derogation: Diverse Uses and Disputed Questions,” in *Jur*, 63 (2003), 213-252 [= HUELS, “Privilege”].

⁹⁰ A.R.A. MCCORMACK, *The Term Privilege: A Textual Study of Its Meaning and Use in the 1983 Code of Canon Law*, Tesi Gregoriana, Serie Diritto Canonico, no. 23, Rome, Pontificia Università Gregoriana, 1997 [= MCCORMACK, *The Term Privilege*].

⁹¹ J.M. HUELS, “Privilege,” 244; cited in V. NKOUAYA MBANDJI, *La prescription*, 188.

⁹² This must be explicitly stated since, although the ordinary rescript of cc. 59-75 cannot contain a new law, the papal rescript *ex Audientia* certainly can. See, e.g., CONGREGATION FOR THE DOCTRINE OF THE FAITH, rescript *ex Audientia* modifying SST/2010, 3 December 2019, at <http://www.vatican.va/romancuria/secretariatstate> [= SST/2019].

in a singular administrative act.⁹³ Since “no judicial (or administrative) decree can derogate from a law,”⁹⁴ *derogare* must mean something else here. Of the various possible meanings for *derogare* here, the Eastern code judiciously selected “not to observe” (*non observare*).⁹⁵ The use of *derogare* in the rescript, therefore, “is not a derogation in the usual sense of the word. It is an exceptional and potentially confusing use of the term.”⁹⁶ The “derogating clause” contained in the 2002 rescript, therefore, authorizes the CDF *not to observe* the terms of prescription in particular cases. With respect to the accused, however, the derogating clause contained in the 2002 rescript is not a favour, since it may harm the acquired right of the accused to be free from a judicial accusation. Huels explains how this may be so.

A rescript grants a favor, but a favor by nature is not harmful, so a derogating clause that harms rights is not by nature a rescript, even if the clause is contained in a rescript granting a favor. One and the same document can grant a favor to one party [e.g., the CDF] and at the same time, through a derogating clause, [authorize] possible harm to the acquired right of another [e.g., the accused]. The granting of the favor is a rescript; the derogating clause that may harm acquired rights is a [singular administrative] decree. Recourse could be taken against the derogating clause by those who believe their rights are injured.⁹⁷

Therefore, the law regarding the terms of prescription promulgated in SST/2001 “remains unchanged and is in force [in all ecclesiastical tribunals]; the derogating clause [of the 2002 rescript] simply grants an exemption [to the CDF not to observe the terms of prescription] in a particular case.”⁹⁸

3.3.2 — *Privilege or dispensation?*

A privilege, like dispensations, can be *contra legem*. Nkouaya Mbandji, still following Huels, argues that the favour granted to the CDF has the

⁹³ *CIC*, c. 38. “Actus administrativus, etiam si agatur de rescripto Motu proprio dato, effectu caret quatenus ius alteri quaesitum laedit aut legi consuetudine probatae contrarius est, nisi auctoritas competens expresse clausulam derogatoriam addiderit.” For the use of a “derogating clause” in a judicial decree, see *CIC*, c. 1670; cf. *CCEO*/1990, c. 1356.

⁹⁴ HUELS, “Privilege,” 244; cited in V. NKOUAYA MBANDJI, *La prescription*, 188.

⁹⁵ *CCEO*/1990, c. 1356. “In ceteris, quae ad rationem procedendi attinent, servantur canones de iudicio contentioso ordinario; tribunal autem potest suo decreto motivis praedito normas processuales, quae non sunt ad validitatem statutae, non observare, ut celeritati salva iustitia consulat.” This formulation is clearly technically superior to that of *CIC*, c. 1670. HUELS, “Privilege,” 245; cited in NKOUAYA MBANDJI, *La prescription*, 189.

⁹⁶ HUELS, “Privilege,” 245-246.

⁹⁷ *Ibid.*, 246-247.

⁹⁸ *Ibid.*, 247.

juridic nature of a privilege rather than a dispensation.⁹⁹ Huels had already made this identical argument with respect to two favours granted to the bishops of the United States in 1994 and 2002.¹⁰⁰ Consequently, we can simply provide here Huels' definition of a privilege, and then apply it to the contents of the 2002 rescript. "A privilege may be defined as a favor, presumed to be perpetual, granted through a particular act of the competent authority for the benefit of specific physical or juridic persons, which gives them the right lawfully to do or omit something contrary to or apart from the law."¹⁰¹ Applying this definition to the 2002 rescript yields the following: The 2002 rescript is a singular administrative act which grants the favour of a privilege (presumed to be perpetual) to the CDF, giving it the right lawfully not to observe the terms of prescription, on a case-by-case basis, at the motivated request of individual bishops.

3.3.3 — *Rescript or decree?*

Finally, although Nkouaya Mbandji does not ask whether or not the 2002 document is in fact a rescript, the question can certainly be raised. As Huels has demonstrated, it is not always easy to determine whether a particular juridic act is a rescript or a decree.¹⁰² Drawing upon and moving beyond the work of Labandeira and Canosa, Huels elaborates five essential "criteria for determining when the rules on rescripts (cc. 60–74) are applicable to a singular administrative act whose precise nature is uncertain."¹⁰³ He helpfully summarizes these criteria in the form of the following five questions, all of which must be answered in the affirmative if the ambiguous act is to be classified as a rescript. (1) Does the act grant something favourable? (2) Is the act given in response to a petition (if not a favour granted *motu proprio*)? (3) Does the petitioner give one or more reasons for the request? (4) Does the competent authority have the discretion to grant or deny the request? (5) Is the purpose of the favourable grant primarily for the petitioner's own benefit and not primarily for the community?¹⁰⁴

⁹⁹ HUELS, "Privilege," 249; NKOUAYA MBANDJI, *La prescription*, 191–196. For a comparative analysis of the two juridic institutes, see McCormack, *The Term Privilege*, 256–276; E. Baura, *La dispensa canonica dalla legge*, Monografie Giuridiche, no. 12, Milan, Giuffrè, 1997, 212–221.

¹⁰⁰ HUELS, "Privilege," 249–250.

¹⁰¹ *Ibid.*, 215.

¹⁰² J.M. HUELS, "Determining the Correct Canonical Rules for Ambiguous Administrative Acts," in *StC*, 37 (2003), 5–53.

¹⁰³ *Ibid.*, 27–32; 36.

¹⁰⁴ *Ibid.*, 36–38; original italics removed.

The answer to the first and fourth questions is clearly affirmative. The answer to the second and third questions may reasonably be presumed to be affirmative. The answer to the fifth question, however, is not immediately self-evident. Huels writes, “If the purpose of the favourable grant is primarily for the petitioner’s own benefit, a rescript is indicated. If it ... pertains to the common good, it is usually a decree (but not always, as rescripts can also be given for the good of the community, e.g., a dispensation for everyone in the diocese).”¹⁰⁵ Since, according to Huels’ criteria, rescripts can also be given for the benefit of the community, then the fifth question can also be answered affirmatively.

3.3.4 — *Singular administrative or singular legislative act?*

Classifying the 2002 document as a rescript which contains a privilege, however, does not remove all doubt about its precise juridic nature. The doubt which remains is unfortunately due to the inconsistencies which remain in the *ius vigens* regarding the precise juridic nature of privileges themselves. Specifically, is a privilege simply and unequivocally a singular *administrative* act, or does it also exhibit characteristics of a singular *legislative* act?

McCormack’s magisterial 1997 dissertation observed that the precise juridic nature of a privilege “has been the object of debate for centuries.”¹⁰⁶ Although this debate has largely been settled, inconsistencies remain. In the *CIC*, rescripts (cc. 59–75) and privileges (cc. 76–84) are both treated in Title IV of Book I: *De actibus administrativis singularibus*. More specifically, in the *CIC*, a privilege is a favour granted to *specific* persons (whether physical or juridic) by means of a singular *administrative* act.¹⁰⁷ This marks a significant break with earlier law and doctrine, which had also recognized *general* privileges “granted by means of [special] law to a category of persons.”¹⁰⁸ In the *CIC/17*, privileges could be granted in a number of different ways: by means of a rescript (c. 62), legitimate custom or acquisitive prescription (c. 63 § 1), or by means of a special law (c. 72 § 4). The *CIC* reordered and greatly simplified the entire discipline concerning privileges and no longer

¹⁰⁵ Ibid., 38.

¹⁰⁶ MCCORMACK, *The Term Privilege*, 13.

¹⁰⁷ *CIC*, c. 76 § 1. “Privilegium, seu gratia in favorem certarum personarum sive physicarum sive iuridicarum per peculiarem actum facta, concedi potest a legislatore necnon ab auctoritate executiva cui legislator hanc potestatem concesserit.”

¹⁰⁸ E. LABANDEIRA, *Trattato di diritto amministrativo canonico*, Trattati di diritto, no. 2, Milan, Giuffrè, 1994, 329; “concessa per mezzo della legge ad una categoria di persone (X 5, 33).”

formally allows them to be granted by singular *legislative* acts but only by singular *administrative* acts. In Labandeira's judgement, this new disposition of law regarding privileges better protects "the principle of equality before the law."¹⁰⁹

Despite the best efforts of the code commission to refine the precise juridic nature of privilege, however, "inconsistencies remain in the Code and certain post-Code documents."¹¹⁰ In order to illustrate further the proper distinction between privileges and special laws, let us consider the following rather curious juridic phenomenon. On 18 March 1999, by means of a document calling itself a "rescript," John Paul II made a large number of concessions (called "privileges and faculties") to cardinals; this "rescript" was also approved *in forma specifica*.¹¹¹ McCormack investigated the suitability of the terms "rescript," "privileges and faculties," and approval "*in forma specifica*" at some length in his excellent study.¹¹² We do not need to follow his entire argument here but agree wholeheartedly with his conclusion.

In the face of this evidence, the questions remain why the document is called a "rescript" and why the concessions it contains are classified as "privileges" and "faculties." After a long and complex process of revision [culminating in the promulgation of the *CIC*], it was determined that a rescript is not a legislative act but an administrative act and that the term "privilege" is to be reserved for individual and particular concessions; provisions enacted for groups or classes of persons are to be treated as special laws and are regulated by the appropriate norms on laws. [The use of the terms] "rescript" and "privilege" and "faculty" [is probably due to the fact] that the text was drafted according to the habits of a former generation in a conventional language that paid insufficient attention to the revised law and the terminological changes which it introduced.¹¹³

McCormack's key insight for the purposes of this study is that "provisions enacted for groups or classes of persons are to be treated as special laws and are regulated by the appropriate norms on laws."¹¹⁴ For this reason,

¹⁰⁹ Ibid., 339; "il principio di uguaglianza davanti alla legge."

¹¹⁰ MCCORMACK, *The Term Privilege*, 14.

¹¹¹ SECRETARIAT OF STATE, *Elenchus privilegiorum et facultatum S.R.E. Cardinalium in re liturgica et canonica Facultate gaudent*, 18 March 1999, in *Comm*, 31 (1999), 11-13, reprinted in *IE*, 12 (2000), 269-272.

¹¹² A.R.A. MCCORMACK, "The Privileges of Cardinals," in *StC*, 37 (2003), 125-162; particularly 153-160.

¹¹³ Ibid., 160-161.

¹¹⁴ Ibid., 160.

McCormack argued that the 1999 document was not, in fact, a rescript at all—but rather the general decree of canon 29.¹¹⁵

According to the above analysis, all three rescripts grant quite powerful privileges—authorizations to inflict or declare even perpetual expiatory penalties *contra legem*, as exceptions to the usual norm of law.

Conclusion

Although the official publication of the legislative norms of SST/2010 was most welcome, three rescripts continue to authorize three congregations to punish according to singular *administrative* norms. But since “The Christian faithful have the right not to be punished with canonical penalties except *ad normam legis*” (c. 221 § 3; LEF/1980, c. 21), and since these rescripts authorize ordinaries to punish *contra legem*, do not the Christian faithful have the right not to be punished in virtue of them? If not, then it must be clearly stated that principle of penal legality has been gravely undermined in the *ius vigens*. Further, if, as Archbishop Charles Scicluna has stated, “Most of the serious flaws in the response of the [Church] to the cases of sexual [abuse] derive from the disregard for the rule of law and the demands of justice,”¹¹⁶ how is justice furthered by continued disregard for the principle of penal legality? Has it been established “that the establishment of the truth and the guarantee of justice require the possibility of the exercise of ... jurisdiction in favour of the common good”¹¹⁷ in a manner which is *contra legem*? Is it, in fact, true that “The relative weakness of the principle of legality is a strength to the Church’s ultimate goal, the salvation of souls”¹¹⁸? It is not at all clear how these propositions are logically distinct from the erroneous opinion that the end justifies the means.

¹¹⁵ Ibid., 156. CIC, c. 29. “Decreta generalia, quibus a legislatore competenti pro communitate legis recipiendae capaci communia feruntur praescripta, proprie sunt leges et reguntur praescriptis canonum de legibus.” Due to the inconsistencies pointed out by McCormack, it is also possible to argue that the 1999 document is a rescript which grants *real* privileges attached to the *res* of the cardinalate. Nevertheless, it remains true in the CIC that “provisions enacted for groups or classes of persons are [better] treated as special laws and [ought to be] regulated by the appropriate norms on laws.” Ibid., 160.

¹¹⁶ SCICLUNA, “Response,” 358.

¹¹⁷ C. SCICLUNA, “Taking Responsibility for Processing Cases of Sexual Abuse Crisis and for Prevention of Abuse” (paper presented at the The Protection of Minors in the Church, Rome, 21 February 2019), 6, at <https://www.pbc2019.org>.

¹¹⁸ JENKINS, “Nullum crimen,” 393.

Although the protection of the extrinsic public good of the Church is an unquestionable good, it is not a good which can be pursued without regard to the legality and justice of the means. In other words, “the use of ... power in the Church cannot be arbitrary, this being forbidden by the natural law as well as the divine positive law and even ecclesiastical law.”¹¹⁹ For Torfs, as well as others,¹²⁰

This is where the major problem of canon law lies: in its current state, it does not protect the law, but the legislator. [In the *ius vigens*], in order to safeguard the common good, the dynamic character of the legislator must be preferred to the static nature of the law. Thus, the ethical value of the anonymous law, of the law without a face, is abandoned in favor of the supposed common sense of the legislator, who always has a face. This is one of the major weaknesses of current canon law, which does not dare give priority to the law as an abstract concept, to the law without a face in order to guarantee the rights of all.¹²¹

Moreover, one can certainly agree with Sr. Rose McDermott that

If we, trained in the law, stand in silence while: allegations are treated as crimes; reputations are irretrievably lost before a formal trial; grave complaints are reviewed by unskilled persons; the rights of the accused to advocacy, defense and recourse are denied; therapeutic evaluations are ordered prior to a penal process; statutes of limitation and the non-retroactivity of the law are forgotten; and the mitigating circumstances lessening imputability and tempering penalties are neglected, we have failed in our ministerial vocation.¹²²

¹¹⁹ PONTIFICIA COMMISSIO CODICI IURIS CANONICI RECOGNOSCENDO, *Principia quae Codicis iuris canonici recognitionem dirigant*, Vatican City, Typis polyglottis Vaticanis, 1967, no. 6. “Verum tamen usus huius potestatis in Ecclesia arbitrius esse non potest, idque iure naturali prohibente atque iure divino positivo et ipso iure ecclesiastico.”

¹²⁰ For similar criticisms of the arbitrary nature of the current system of penal law, see R.G.W. HUYSMANS, “De begrafenis van canonieke rechtspraak in strafzaken,” in *Tijdschrift voor Theologie*, 42 (2002), 289-310; idem, “The Inquisition for Which the Pope Did Not Ask for Forgiveness,” in *Jur.* 66 (2006), 477-482; K. MARTENS, “Les délits les plus graves réservés à la Congrégation pour la doctrine de la foi,” in *RDC*, 56 (2006), 218-220.

¹²¹ TORFS, “La rétroactivité,” 197. “C’est ici que se situe le problème majeur du droit canonique, car en l’état actuel, il ne protège pas la loi, mais le législateur. [Dans le *ius vigens*] pour sauvegarder le bien commun, le caractère dynamique du législateur doit être préféré au caractère statique de la loi. Ainsi, la valeur éthique de la loi anonyme, de la loi sans visage, est abandonnée au profit du bon sens supposé du législateur qui, lui, a toujours un visage. Là se situe une des faiblesses majeures du droit canonique actuel, qui n’ose pas donner priorité à la loi comme concept abstrait, à la loi sans visage afin de garantir les droits de tous.”

¹²² R. McDERMOTT, “Acceptance Speech: Role of Law Award,” in *CLSAP*, 64 (2002), 436-437.

In light of these observations, it is particularly odious that the competence of the Supreme Tribunal of the Apostolic Signatura to review sentences rendered by the Supreme Tribunal of the Congregation for the Doctrine of the Faith was revoked just three months after the 2002 rescript was issued. It is also odious that, since decrees issued in virtue of the 2008 and 2009 rescripts are approved *in forma specifica*, they, too, cannot be impugned. These facts give rise to the suspicion of the arbitrary; the suspicion that these decisions are verdicts of power rather than of truth; the suspicion that some members of the Christian faithful are being punished not *ad normam legis*, nor even *ad normam iuris*, but merely *ad nutum superioris*. The author should like to leave the last word to the secretary at the Supreme Tribunal of the Apostolic Signatura.

Punish, therefore, [the guilty]—certainly; ... but always within a system that does not renounce fundamental guarantees, without which the juridic order ceases to be such: the presumption of innocence, the right of defence, the non-retroactivity of positive penal law (unless, in virtue of the principle *favor rei*, a milder penalty has been promulgated after the crime), the necessity of arriving at moral certainty before pronouncing sentence, and, last but certainly not least, [the institute of] prescription, since it is rooted, albeit mediately, in the natural law itself.¹²³

¹²³ SCIACCA, “Principio di legalità e diritto penale canonico,” 12-13. “Punire, dunque, sì; ... ma pur sempre all’interno di un sistema che non rinunci a fondamentali garanzie, senza le quali l’ordinamento giuridico cessa di esser tale, quali la presunzione di non colpevolezza, il diritto di difesa, la irretroattività della legge penale positiva, a meno che successivamente al reato non sia stata promulgata una pena più mite, in forza del principio del *favor rei*, la necessità della raggiunta certezza morale prima di profferir condanne e, certo non per ultima, la prescrizione, siccome radicata, seppur mediatamente, nel diritto naturale medesimo.” The article is an updated version of *idem*, “Principio di legalità e ordinamento canonico,” 183-194.

THE LEGAL ART OF IRNERIUS

THE HERMENEUTICS BEHIND THE MEDIEVAL RENAISSANCE OF ROMAN LAW

L. GREGORY BLOOMQUIST

SUMMARY — The principal figure in the renaissance of Roman law in the late eleventh twelfth century was Irnerius of Bologna (ca. 1055-ca. 1130). Transcending the legal debates of his day, Irnerius sought to clarify fundamental legal principles by using available exegetical tools on the Justinian *Corpus*. In doing so he established the groundwork for the philosophy and theology of law that developed during the twelfth century. This article highlights key elements of Irnerius's method and provides example of his attention to legal principles of *aequitas*, *iustitia*, and *ius*.

RÉSUMÉ — La figure principale de la renaissance du droit romain à la fin du XI^e siècle était Irnerius de Bologne (v. 1055-v. 1130). En voulant transcender les débats juridiques de son époque, Irnerius a cherché à clarifier des principes juridiques fondamentaux. Afin de le faire, il a utilisé des outils exégétiques disponibles pour lire le *Corpus* Justinien. Ce faisant il a établi les bases de la philosophie et de la théologie du droit développées au cours du XII^e siècle. Cet article met en évidence les éléments clés de la méthode d'Irnerius et donne un exemple de son attention aux principes juridiques de l'*aequitas*, l'*iustitia* et l'*ius*.

Introduction

One of the principal figures in the renaissance of Roman law in the late eleventh and early twelfth centuries was the founder of the school of glossators at Bologna, Irnerius (ca. 1055-ca. 1130).¹ Through new teaching methods (exeget-

¹ A simple but not entirely helpful overview is available in T. D. DOUGHERTY, "Irnerius," in *New Catholic Encyclopedia*, 2nd ed., Detroit, Thomson/Gale, 2003, 7:584-585 (= *NCE*). This also has a listing (though in no way exhaustive) of somewhat recent works by and about

ical) and new subject material (the *Corpus* of Justinian's laws, especially the *Digest*), the *lucerna iuris* was able to promote radically new directions for a decaying jurisprudence.² The method and the content in Imerius's work interacted so as to provide a new *ars* of legal science, capable of identifying and discussing fundamental legal principles. The study is in three parts: rhetorical and hermeneutical shifts in the twelfth century renaissance, the legal art of Imerius, and the relationship among *iustitia*, *ius*, and *aequitas* as examples of Imerius's legal art.

1 — Rhetorical and Hermeneutical Shifts in the Twelfth Century Renaissance

The twelfth century opened to a wide variety of intellectual advances in all fields, including juridical and scientific endeavours.³ Though it is impossible to provide a cause for every advance or change, basic mechanisms for the changes were the geographical and social shift in centres of economic wealth and the new modes of production, the Carolingian Renaissance followed by the pontificate of Gregory VII (1073-1085), the investiture controversies,⁴ the new Norman administration, the beginnings of the Cistercian order and other long-range events, such as the Crusades. All of these in some way provided the opportunity for an atmosphere of economic development within which theoretical studies could develop, starting in the eleventh century.

It was in that context that we find a focused constellation of authors being read in the tradition of the trivium: grammar, rhetoric, and dialectic. These

this little-known figure (585). My work depends heavily on the close textual analysis of Imerius's glosses, beginning with the best assessment of which works belong to Imerius and which do not, found in Hermann KANTOROWICZ, *Studies in the Glossators of the Roman Law: Newly Discovered Writings of the 12th Century*, in collaboration with William Warwick BUCKLAND, Cambridge, Cambridge University Press, 1938; though see Charles M. RADDING, *The Origins of Medieval Jurisprudence: Pavia and Bologna, 850–1150*, New Haven, Yale University Press, 1988, 7-13 [= RADDING, *Origins*] for sharp criticism of Kantorowicz, which continues throughout Radding's work. For a study of Imerius's later work, see Enrico SPAGNESI, *Wernerius Bononiensis iudex. La figura storica d'Imerio*, Accademia toscana di scienze e lettere La Colombaria. Studi, Florence, L.S. Olschki, 1970.

² The ascription *lucerna iuris* applied to Imerius is found in Odofredo's thirteenth century account of the school of Bologna. For the quote and alternative versions of the account, see RADDING, *Origins*, 159.

³ One of the best studies of the so-called "Twelfth Century Renaissance" remains Charles Homer HASKINS, *The Renaissance of the Twelfth Century*, Cleveland, World Publishing, 1957.

⁴ On the importance of the investiture controversies for the development of legal traditions, see Harold J. BERMAN, *Law and Revolution: The Formation of the Western Legal Tradition*, Cambridge, Harvard University Press, 1983.

authors date back to the philosophical works of Plato, Aristotle, and the philosophical and rhetorical texts of Cicero, but they also include more recent grammarians like Martianus Capella, Cassiodorus, Isidore,⁵ and dialecticians like Boethius.⁶ The pertinence to legal study was clear in the case of some. For example, Cicero's *Topica*, in which he presents the basic notion of *ius civile*,⁷ is intended first of all as a manual for rhetoric, not law. But dialectic, in which definitions or judgments regarding kinds and species are the primary elements employed to maintain a truthful inquiry, had begun to reach a wider audience in the period immediately prior to the twelfth century in the writings of Boethius. Grammar, rhetoric, and dialectic will provide the foundations for the twelfth century origins of the scholastic method, but they had already begun to provide Irnerius in the eleventh century with the essential tools for the development of a new legal art, one that would develop within the burgeoning new socio-economic order taking shape in Europe.⁸ While some scholars have noted the social and legal developments that influence Irnerius, this study seeks to identify the impetus for Irnerius's art as arising from an extended application of the liberal arts to legal science.

2 — *The Legal Art of Irnerius*

Prior to the late eleventh century, the study and practice of law had been reduced in the West to an unreflective and barbarized mixture of misinterpreted Roman law and Germanic customs. Roman law was really only to be found in a form similar to the way it was found in the *Breviarium alaricianum* in which the *Codex theodosianus* had been adopted wholesale, along with parts of other texts, most notably the *Institutes* of Gaius. Prior to this period, laws were of necessity personal and only later territorial. This was due to the fragmentation of the Empire and to the resulting racial and societal mixture.⁹ Changes, however, began to occur with developments in three law schools: Pavia, Ravenna, and Bologna.

⁵ See ISIDORE OF SEVILLE, *Etymologiarum sive originum, libri 20*, ed. W. M. LINDSAY, Scriptorum Classicorum Bibliotheca Oxoniensis, Oxford, Clarendon, 1911.

⁶ Subsequent references to the works of Boethius and Cicero are drawn from the Loeb Classical editions.

⁷ Similarly in Cicero's *De inventione* and the Ps. Cicero *Rhetorica ad Herenniam*.

⁸ RADDING, *Origins*, 113.

⁹ For an overview of the situation prior to Irnerius, see Paul VINOGRADOFF, *Roman Law in Medieval Europe*, reprint of 1929 ed., foreword by Peter Stein, Oxford, Clarendon Press, 1968, 24-42 [= VINOGRADOFF, *Roman Law*]; C. VOGEL, "Canon Law, History of: 1. Early Church," in *NCE*, 3:37-41; H. FUHRMANN, "Canon Law, History of: 2. Carolingian Era,"

The Lombard law school at Pavia had survived the Frankish conquest and lasted well into the eleventh century. Its concern was primarily territorial. It dealt with Lombard law but began “to look to Roman law for instruction and direction.”¹⁰ A school of law had also begun to develop at Ravenna,¹¹ but it also was dominated by territorial concerns, as it became enmeshed in the practical affairs of the German investiture controversy. The school at Bologna, in contrast, developed institutionally beyond mere territorial concerns, in part due to the conditions developing in the rest of Italy and as a counter-balance to the German-oriented, Imperial school at Ravenna.¹² To counter King Henry IV, the Marchioness Matilda either sent Innerius, then a professor of Arts, to Rome to study law or authorized him to do so on his own.¹³ When Innerius returned to Bologna about 1084, he began to teach his developing new art.

Innerius’ art was truly unique. In his new curriculum, Innerius did not limit himself to a mere application of the rules of law.¹⁴ His curriculum set out to investigate the *Corpus iuris civilis* (as we now know it) in its newly-discovered entirety, using new methodological tools.¹⁵ As a result, the school of Bologna, founded by Innerius, was the one school that rose above personal and territorial concerns but also above merely legal concerns *ad litteram*.

First of all, Innerius was able to utilize the *Digest*, which had only become available in this period.¹⁶ The recovery of the *Digest* even as it was known

in *NCE*, 3:41-44; C. MUNIER, “Canon Law, History of: 3. False Decretals to Gratian,” in *NCE*, 3:44-46. For a recent approach to the history of legal science before Innerius, see RADDING, *Origins*, 1-157.

¹⁰ VINOGRADOFF, *Roman Law*, 53.

¹¹ For a cursory but helpful overview of Ravenna, see RADDING, *Origins*, 6.

¹² VINOGRADOFF, *Roman Law*, 55. This seems to have been the spark; however, it would seem strange that there would have been no influence from the eastern Empire where the Ἐκλογία had appeared in 740 and the *Basilica*, modeled on Justinian’s Code, appeared in the ninth century. See Wolfgang KUNKEL, *An Introduction to Roman Legal and Constitutional History*, trans. J.M. Kelly, Oxford, Clarendon Press, 1966, 167-168.

¹³ On this tradition regarding the commission and initial curriculum of Innerius, see especially VINOGRADOFF, *Roman Law*, 55-56.

¹⁴ Radding accurately determines that, on his return, Innerius moves in a direction that is “significant in the development of a legal science increasingly distinct from the body of laws themselves” (RADDING, *Origins*, 134).

¹⁵ For the *Corpus*, I have used Paul KRÜGER et al. (eds.), *Corpus iuris civilis*, Berlin, Weidmann, 1915-1929. For general information on the *Corpus* as it was received in the Middle Ages, see Harold DEXTER HAZELTINE, “Roman and Canon Law in the Middle Ages,” in J.R. TANNER, C.W. PREVITÉ-ORTON, and Z.N. BROOKE (eds.), *Cambridge Medieval History*, vol. 5, Cambridge, Cambridge University Press, 1926, 697-764.

¹⁶ According to Schulz, “the Bolognese school was born of the rediscovery of the *Digest* and that thenceforward the jurists of the *Digest* became accepted as the pattern and followed as such may be taken as admitted facts.” See Fritz SCHULZ, *History of Roman Legal Science*,

and used at Bologna was crucial; however, the discovery alone does not explain Innerius's legal art. Equally important was the new approach to law and the resulting legal curriculum following the model of Pavia, which had shown the value of the dialectical approach by using *formulae* in discussion.¹⁷ As a professor of the *trivium*, Innerius already had the basic notions of Roman law through Cicero and indirectly through commentators such as Boethius. Therefore, he already had a broad perspective on the entire body of the laws of Justinian as the culmination of the history of Roman law. But the new, developing proto-scholastic method provided Innerius with an exegetical instrument whereby conflicting parts of the *Corpus* could be reconciled, or certain texts shown to support others.¹⁸ Innerius was therefore in possession of both new material and a new method which he was able to apply to the new material with a view to determining the theoretical concern of the laws of Justinian, rather than just further codifying and updating the laws themselves. It is hard to overstate the significance of Innerius's work for the philosophy of law in his fashioning of a legal art.¹⁹

Innerius's art was grounded in translating or commenting upon the *Corpus* while ensuring no alteration to the laws, as Justinian had ordered.²⁰ He sought to achieve this by way of interlinear or marginal glosses—the only extant texts believed to be identifiably from the pen of Innerius, at least during this initial period²¹—which could be made on words or passages *ad*

Oxford, Clarendon, 1946, 100 (= SCHULZ, *History of Roman Legal Science*). In spite of his criticisms of the importance given to the discovery of the *Digest* alone, when Radding turns to his study of Innerius and the immediately prior pre-Innerian period, he admits Kantorowicz's point: Innerius flourished in a period that was characterized by a rediscovery of the *Digest* (RADDING, *Origins*, 113). At Bologna, the *Digest* was divided into three parts. The section from Book 24, Title 2 to the end of Book 38 was missing until Innerius used it, calling it the *Infortiatum*. On the importance of the complete *Codex* in the Pisa manuscript, see RADDING, *Origins*, 151-157.

¹⁷ Radding notes the extent of such formulations prior to Innerius (RADDING, *Origins*, 171).

¹⁸ Of his antecedents in the realm of legal science, the name "Pepo" is consistently mentioned (RADDING, *Origins*, 161-162). However, since a possible judge Pepo with connections both to Bologna and the Marchioness Matilda left no writings behind, it is impossible to know his significance, especially in that Innerius does not mention him in extant texts.

¹⁹ Unfortunately, the significance of Innerius is absent from Rooney's overview of the philosophy of law. Rooney limits his comments on the period to one line on the significance of Matilda (M.T. ROONEY, "Law, Philosophy of," in *NCE*, 8:402).

²⁰ HAZELTINE, "Roman and Canon Law," 736. See also A. ROTA, "La concezione inneriana dell'*aequitas*," in *Rivista internazionale della filosofia del diritto*, 26 (1949), 242-243 (= ROTA, "Concezione inneriana").

²¹ Kantorowicz has compiled the previously unpublished writings of Innerius from the Royal MS 11 B.XIV and has denied that other works previously thought to belong to the Innerian corpus of glosses are his. For an assessment of the vast numbers of texts that are attributed

litteram to arrive at the *mens legis*.²² These glosses were, however, not a mere dictionary or index, since they show how Irnerius introduced rhetorical analysis and thus created an exegetical treatment of the titles or rubrics (*apparatus*) and systematic treatises on parts of the *Corpus (summae)*.²³ Finally, Irnerius's approach to the text moves from grammar, through rhetoric, to dialectic, in which he explores causes and relations.²⁴

One type of gloss considered especially necessary was "an introduction which deals with certain general aspects of the special subject matter treated in the writings to which it belongs,"²⁵ namely, the *materia*. As Kantorowicz notes, the *materia* "suggested ideas on the basic divisions of the law and on the theory of the sources"²⁶ and is essential for understanding the underlying principles of the laws. The stages of the *materia* were those found most prominently in the work of an author like Boethius, which helps to confirm that Irnerius's new legal art is developing preeminently in discussion with authors like Boethius as a new philosophy of law, rather than a handbook for the creation of new laws.²⁷

An exemplary *materia* can be found in the *Materia codicis* from Bulgarus (c. 1125), Irnerius's most important pupil. In the *Materia codicis*, Bulgarus analyzes a single aspect of the *Codex* in ten different rhetorical contexts: from

to Irnerius but that are not by him, see KANTOROWICZ, *Studies*, 33-37. This situation has forced scholars to depend completely on Kantorowicz's edition, as well as those of E.M. MEYERS, "Le conflit entre l'équité et la loi chez les premiers glossateurs," in *Tijdschrift voor Rechtsgeschiedenis*, 17 (1941), 117-135 and ROTA, "Concezione irneriana," 243-226.

²² See Gabriel LE BRAS, *Histoire du droit et des institutions de l'Église en Occident*, Paris, Sirey, Cujas, 1955, 7:32 (= LE BRAS, *Histoire*); K.W. KNÖRR, "Glosses, Canon Law," in *NCE*, 6:248-249.

²³ The system of glosses was to have significant repercussions in the field of canon law, which eventually adopted the method. See KNÖRR, "Glosses, Canon Law."

²⁴ It seems to me that Radding misses this point. He correctly assesses that Irnerius's art is sophisticated but can only conclude that it is because he must be exercising the specific knowledge of a jurist gained at the feet of someone like Pepo (RADDING, *Origins*, 168-169). Radding is correct that Irnerius was not simply a grammarian, commenting on words alone in a way that one could conclude was shaped perhaps almost exclusively by authors like Martianus or Isidore (RADDING, *Origins*, 180), but I believe that in discounting the influence of, for example, Cicero and Boethius (RADDING, *Origins*, 171), both of whom were central in Irnerius's development of a legal art, Radding fails to arrive at a full understanding of Irnerius's legal art.

²⁵ KANTOROWICZ, *Studies*, 37. Further testament to Irnerius's place in the larger body of medieval hermeneutical work is the fact that the *materia* is "a type of medieval literature which occurs in many, perhaps in all branches of medieval science."

²⁶ *Ibid.*, 37.

²⁷ See the extended discussion on Boethius in *ibid.*, 40-41.

a discussion of the title (*nomen*), thorough the *materia*, *intentio*, and *finis* common to all legal material on the subject (*communis*) as well as material proper (*propria*) to the Justinian code itself, and concluding with the *pars philosophiae* or the ethical discussion of the text's material and the *continuatio* of the body of the *Codex*.²⁸ What is interesting about this work is that Bulgarus's *Materia codicis* followed Irnerius's own model, as did the *Materiae* of all Irnerius's subsequent students.

As such, Irnerius new treatment of the newly discovered legal material made possible a curriculum in which the several laws and their internal relations could be more fully addressed theoretically. In the simple case of the analysis of the *materia*, we find a constant pattern of a rhetorical and dialectical treatment that extends from Irnerius through to Accursius. It confirms that a tradition had started to appear with Irnerius, one that is eloquently summarized in Martinus's gloss to the preface of the *Institutes*: *morem recte scribentium servans Iustinianus prologum premitit in quo lectores attentos, dociles et benevolos reddit*.²⁹

That "custom" that results from an analysis of Justinian's work, including the Preface, is discovered through the use of the writings of grammarians, rhetoricians, and dialecticians.³⁰ Irnerius's new legal art, which allowed for a focus on perennial legal issues through a methodology derived from the classical authors in the tradition of the *trivium*, became the curriculum for which this "custom" was a crucial element and would become the model for legal interpretation.

3 — *The Relationship among iustitia, ius, and aequitas as Examples of Irnerius's Legal Art*

An excellent example of the developing methodology characteristic of this new legal art is found in the way that Irnerius seeks to navigate issues of *iustitia*, *ius* and *aequitas* and their relationships. We shall consider Irnerius's grammatical and philosophical grounding of *iustitia*, the philosophical and theological grounding of *iuris prudentia* and the difference between *iustitia* and *ius*, and *aequitas* as foundation for *iustitia* and *ius*.

²⁸ See *ibid.*, 42.

²⁹ Cited in *ibid.*, 40.

³⁰ Kantorowicz identifies the same wording in several students of Irnerius and notes that "the 'mos' to which they allude is, of course, that taught in the arts schools," by which he means the way in which the *trivium* made such introductions or prefaces obligatory. See *ibid.*, 40.

3.1 — Grammatical and Philosophical Grounding of *iustitia*

According to Rota, Irnerius's entire body of work is geared to a better understanding of *iustitia*.³¹ We can see this by looking at his gloss on the introduction to the *Institutes*.³² There, Irnerius addresses Ulpian's fundamental definition of *iustitia* (*Inst.* I.1.1): *iustitia est constans et perpetua voluntas ius suum cuique tribuens*. Characteristic of his legal hermeneutic, Irnerius deals with these two elements of the definition by analyzing them in terms of categories found in the early Academy and Aristotle, and eventually in the work of Boethius and Papias (particularly his dictionary of 1063, the *Elementarium*).³³ Strikingly, as Kantorowicz astutely notes, there is nothing properly juristic in this way of approaching *iustitia*, nor is it required by legal science. Rather, Irnerius seems to have a broader goal in mind, namely, the grammatical goal of reaching a definition so as to be able to relate the parts of the definition to other essential components in a dialectical fashion. What is unique is Irnerius's rhetorico-juristic intention, namely, to classify *iustitia* under its *genus*, namely, *virtus*.³⁴

To achieve this end, Irnerius first establishes the category (or *genus*) and then the specifics (or *specificae*) in the case of *iustitia*: *et nota, quod in diffinitione iustitie ponit diffinitionem sui generis, id est virtutis*.³⁵ In other words, Irnerius classes *iustitia* under the *genus* of *virtus* by drawing on the ninth definition of *virtus* in Papias, who cites the well-known Stoic formulation: *Virtus ... habet partes quatuor: prudentiam iustitiam fortitudinem temperantiam*. Irnerius renders it: *Huius speciei virtus est genus, virtus enim quatuor principales habet species: iustitia, prudentia, fortitudo, temperantia*.³⁶ The *genus* in this way allows him to gloss the definition, starting with *constans et perpetua voluntas*:

*cum enim dicit 'constans,' intelligit mentis bene constitute, constantia etenim non nisi in bona significatione intelligitur; cum autem dicit 'perpetua', intelligit habitum, habitus enim est 'voluntas' difficile mobilis et in vita permanens; ac si diceret: iusticia est habitus mentis bene constitute tribuens ius suum uniuersique. Istud solum est diffinitio propria iustitie.*³⁷

³¹ ROTA, "Concezione irneriana," 241.

³² See his *Exordium institutionum secundum Irnerium* in KANTOROWICZ, *Studies*, 240, in the section entitled "Opuscula." In his edition of the text, Kantorowicz has termed it *secundum*, due to its probable compilation at the hand of someone other than Irnerius.

³³ *Ibid.*, 60. For Papias, see PAPIAS, *Papias vocabulista (Impressum Venetiis per Philippu de pincis Mantuanum, 1496)*, facsimile ed., Turin, Bottega d'Erasmus, 1966.

³⁴ KANTOROWICZ, *Studies*, 59.

³⁵ Irnerius, *Exordium* in *ibid.*, 240, paragraph 2.

³⁶ *Ibid.*, 240.

³⁷ *Ibid.*, 240, paragraph 2.

As Kantorowicz shows, Innerius uses Papias's first definition of *virtus* to clarify the word *constans*: *Virtus est habitus bene constitute mentis*. Similarly, Innerius draws on Papias's ninth definition of the *genus virtus* in his understanding of *perpetua*, even as he did for *iustitia*: *Virtus est animi habitus nature moderationi consentaneus. Hec habet partes quatuor: prudentiam iustitiam fortitudinem temperantiam*.

According to Kantorowicz, Innerius thus "arrives by a purely dialectical (i.e., logical) technique, emphasized by a threefold 'enim,' at the result that Ulpian's definition of justice agrees perfectly with, and indeed embodies, the accepted medieval concept of virtue."³⁸ In other words, through Innerius's gloss, the *Institutes'* *Iustitia est constans et perpetua voluntas* becomes recognizably Papian in its formulation: *Iustitia est habitus mentis bene constitute*.

But, while it is clear that Innerius's legal art draws on Papias, it is not simply a grammatical study, since Papias adopted his formulations not only from the grammarian Isidore (*Etymologies* II.24.6) but also from the philosophical rhetoricians Cicero (*Inv.* II.160) and Boethius, who had adopted their formulations from earlier philosophical reflection.³⁹ Innerius does likewise. In other words, Innerius's legal art is shaped by the trivial constellation of classical grammar, rhetoric, and dialectic derived from Plato through Aristotle to Cicero, Boethius, Papias, and others, rather than by one alone or by juristic reflection alone, even in the case of the definition of something as fundamental to juridical science as the meaning of *iustitia*. Innerius's legal art will involve a broad hermeneutic of tools and textual comparison, and his approach to *iustitia* evidences the methodological shaping of his new legal art.

3.2 — Philosophical and Theological Grounding of *iuris prudentia* and the Difference between *iustitia* and *ius*

A second example of his new art can be found when Innerius turns to the question of *iuris prudentia*, which immediately follows his treatment of *iustitia* (*Inst.* I.1.1): *iuris prudentia est diviniarum atque humanarum rerum notitia, iusti atque iniusti scientia*. Again, it is striking that Innerius appears to begin his treatment by criticizing the definition of *iuris prudentia* as found in the *Inst.* on the grounds that this definition creates a confusion of *genus* and *specificae*: *Similiter in diffinitione prudentie iuris ponit et generalem et specialem diffinitionem, ut si diceret de homine: substantia animata sensibilis,*

³⁸ Ibid., 61.

³⁹ Ibid.

rationabilis et mortalis.⁴⁰ However, what makes this formulation doubly surprising is that his reformulation elsewhere, namely, *iusti et iniusti scientia habita in rebus divinis et humanis precognitis*,⁴¹ is grammatically counter-intuitive. But, this is an important continuation of our first point, namely, that Irnerius's reformulations here and elsewhere are only difficult grammatically if we limit them to grammatical formulations. But they cannot and should not be, since they are part of a much more complex hermeneutical whole. In fact, Irnerius's reformulation here makes "good and even deep sense philosophically" as Kantorowicz notes: "Modern jurisprudence would express the same truth by saying that rational legal science ('scientia') and empirical social knowledge ('rerum humanarum notitia') condition each other mutually, or that 'Life' and 'Law' must interpret each other."⁴²

Furthermore, when Irnerius adds *in rebus ... precognitis*, he makes explicit a distinction that is not explicit in the original legal texts. To do so, Irnerius introduces foreknowledge, something that is as extraneous to the interpretation of *iuris prudentia* in legal texts and even to legal studies in general as are the philosophical and theoretical concerns on which he draws when clarifying what *iustitia* is. So, here we find a second significant feature of Irnerius's legal art: he will draw on philosophical and theological tools to establish the theological foundation for interpreting the Roman legal texts.

To do so, Irnerius again follows the lead of one of his historical mentors, Boethius. In *De consolazione philosophiae* 5, Boethius argues against attributing past and future to the divine mind, which beholds all things as an eternal presence.⁴³ Therefore, we speak incorrectly about God's foreknowledge. But, if we are to know wisdom, we must have the mind of God: *illic enim ratio videbit quod in se non potest intueri, id autem est, quonam modo etiam que certos exitus non habent, certa tamen videat ac definita praenotio neque id sit opinio sed summae potius scientiae nullis terminis inclusa simplicitas* (*Consol.* V.5).

How is this relevant to Irnerius's gloss on *iuris prudentia*? When that which is present to God is referred to God's knowledge, it is necessary; however, when that which is not present to God is considered in and of itself, it is not necessary (*Consol.* V.6). As such, Irnerius distinguishes between the

⁴⁰ IRNERIUS, *Exordium*, paragraph 3.

⁴¹ IRNERIUS, Gloss on *Dig.* I.1.10.2, cited in KANTOROWICZ, *Studies*, 63.

⁴² KANTOROWICZ, *Studies*, 63.

⁴³ The *Consolatione* was widely used and interpreted throughout the Middle Ages, there being as many interpretations as there are uses. See Pierre COURCELLE, *La consolation de philosophie dans la tradition littéraire: Antécédents et postérité de Boèce*, Paris, Études augustiniennes, 1967.

sensible and accidental world and that world which knowledge is able to discover beyond the sensible or accidental world, the intelligible and necessary world of universals.

Here, we find a fundamental notion that will be crucial for Irnerius's differentiation of *iustitia* and *ius*. There are norms (*ius*) subject to the contingency of custom and society, and those that are not (*iustitia*). In fact, consistent with the Justinianic intent of the *Institutes*, Irnerius sees *ius* not only as a provision of authority for *iustitia* where authoritative will seeks to govern custom and society but also as rule that must derive from necessary or divine authority (*iustitia*). Stated otherwise, "(I)o *ius* appare quindi la veste esteriore, la struttura giuridica positiva della regola naturale di *iustitia*."⁴⁴ Irnerius's interpretation echoes Aristotle through the medieval neo-Platonic tradition of both Porphyry and Boethius, for whom words have authority or power of signification by means of human institution but only by drawing on a more fundamental meaning.⁴⁵ More cautiously worded than Cicero's *in paribus causis paria iure desiderat* (*Top.* 4.23), Irnerius's division provides a basis for separating the natural from the human that is implicit in its formulation.⁴⁶

In sum, where the authority of *iustitia* is natural or divine, the authority of *ius* is human because it is produced by the will. *Ius* in this way becomes the juridical structure of *iustitia* manifested in rule.⁴⁷ Irnerius sums up the difference in the prologue to the *lectura codicis*: *ius enim hominum arte constitutum est. maiorem tamen esse iustitiae quam iuris auctoritatem manifestum est, quippe iustitiae deus auctor est, iuris homo*.⁴⁸

3.3 — *Aequitas* as Foundation for *iustitia* and *ius*

This brings us to the third example of Irnerius's art, his understanding of *aequitas*. According to Radding, the late eleventh or early twelfth century *Expositio*, associated with the name of Boretius, constituted "the most

⁴⁴ ROTA, "Concezione irneriana," 255.

⁴⁵ See ARISTOTLE, *Int.* 16a3-19. Irnerius's wording also suggests a certain "sacramental" nature to *ius* as the visible form of *iustitia*.

⁴⁶ Irnerius's concern in this question is also seen in the fact that, when discussing the *intentio communis* of the *Materia codicis*, he alone distinguished juridically the acts of *promulgatio* (the legislator's subject matter) and *compositio*, while the other glossators sufficed with a division of *communis* and *propria* (a formal distinction). See KANTOROWICZ, *Studies*, 45-46. Thus, the questions dealt with here are not those of amending laws but of the theoretical foundation for them.

⁴⁷ ROTA, "Concezione irneriana," 252-255.

⁴⁸ Cited in *ibid.*, 256.

advanced work of eleventh century jurisprudence” and possibly “the most sophisticated piece of medieval legal writing before 1150.”⁴⁹ However, this work contained only the beginnings of the formation of “general legal principles,” including the fact that though the notion of *aequitas* is invoked, there is no “overt effort to define what it is.”⁵⁰ Yet, this is precisely what Irnerius attempts to do in the eleventh century, putting in evidence not only his creative contribution but also the significant implications of his new legal art for a philosophy of law.

According to Irnerius, *equitas enim in ipsis rebus percipitur*,⁵¹ or as it appears in the anonymous gloss, *equitas in rebus proprie utitur*.⁵² For Irnerius, *aequitas* becomes “l’ordinamento recondito nelle cose il quale postula, solo come conseguenza, che in *paribus causis* vi siano *paria iura*.”⁵³ In contrast, *iustitia [proprie utitur] in affectione [not in rebus], id est voluntate utitur et est habitus mentis bene constitutus*.⁵⁴ Irnerius thus establishes a philosophical basis for any discussion of law by establishing the ground of *iustitia in aequitas* in things such that *iustitia* is “la volontaria attuazione dell’*aequitas*.”⁵⁵ In this way, we can correct Vinogradoff’s statement that Irnerius saw equity as “the mere enunciation of a principle of justice.”⁵⁶

Although, as Rota notes, this relationship leaves the question of the difference between *ius* and *aequitas* aside, in a gloss on the Code Irnerius clearly distinguishes *aequitas* from *ius*. He asserts that *aequitas*’s formal property is *proponere*, while that of *ius* is *proponere volendo, scilicet aliquantum auctoritate subnecti*.⁵⁷ *Aequitas* simply proposes what is right by rational necessity, while *ius* proposes authoritatively, specifically by establishing the will of the emperor or any superior human institution

⁴⁹ RADDING, *Origins*, 125.

⁵⁰ *Ibid.*, 134.

⁵¹ IRNERIUS, Gloss on *Dig.* I.1.1, cited in ROTA, “Concezione irneriana,” 248.

⁵² Cited in *ibid.*, 250.

⁵³ *Ibid.*, 251.

⁵⁴ Cited in *ibid.*, 250.

⁵⁵ *Ibid.*, 251.

⁵⁶ VINOGRADOFF, *Roman Law*, 66. In another paragraph, Irnerius seems to have created a distinction between *aequitas* and *iustitia* by stating that *aequitas* is concerned *in rebus*, and *iustitia* is concerned *in voluntate*. This would seem to imply a separating out either by intellectual intention or by ethical intention or by both of elements that are inherent in creation and that are placed in their natural order. This can be observed in Irnerius’s approach to the matter of definition where the logical *ordo certus* allows him to deal with Ulpian’s “incorrectly” formulated definition of *iuris prudentia*. See KANTOROWICZ, *Studies*, 63.

⁵⁷ IRNERIUS, Gloss on *1.1 C De legibus* 1.4, cited in ROTA, “Concezione irneriana,” 251. According to Rota, “L’ufficio dell’*aequitas* è dunque quello di *simpliciter proponere*, cioè di indicare semplicemente.”

(a *praecipiens*).⁵⁸ Irnerius thus further distinguishes between natural law (*iustitia*)—which for him was also divine law—and the rule of law (*ius*).

Kantorowicz singles out the reason for Irnerius's treatment of the difference between *aequitas* and *ius* in the *Materia codicis* as a conscious contrast that sought to deal with the problem of unjust laws. As seen in the same gloss,⁵⁹ the concern is with the *intentio* of *ius* (*exponere vel interpretari*), a proof of this concern which Kantorowicz sees in the *Summa codicis londoniensis* of distinguishing *adhuc rudis aequitas* and *aliter consitututa quam debeat*.⁶⁰ In other words, the responsibility of the legislator is not only to embody justice (*iustitia*) in law but to reform existing laws (*ius*) that are unjust according to the principle of *aequitas*.⁶¹ This is not merely a philosophical distinction since such laws are not *in abstracto*: they concern human dealings, much as what Hermogenianus set forth as the domain of *ius gentium*.⁶²

In his concern for correct formulations of *aequitas* and *ius*, Irnerius resembles authors of the Hellenistic renaissance in the Empire when the *Corpus* was compiled.⁶³ There also the concern was with a proper dialectical understanding that would make possible a proper legal science with proper understandings of major conceptions, such as *aequitas*. Not surprisingly, it is in the Hellenistic period that Aristotle's ideas of equity to correct unjust νόμοι were readopted.⁶⁴

In this way, Irnerius's legal art perhaps unwittingly re-establishes a classical concern for the value of the human personality and the well-being of that personality.⁶⁵ During the Middle Ages, Roman law was always in evidence in discussions about the relations between men,⁶⁶ but through Irnerius's legal art, which re-introduces a classical, Greek mode of thought, a new conception of the physical world as the world of man's production and

⁵⁸ ROTA, "Concezione irneriana," 252. Rota develops the notion of the legislator more fully on pp. 252-254.

⁵⁹ IRNERIUS, *Materia codicis secundum Irnerium* in KANTOROWICZ, *Studies*, 238-239. See paragraph 4.

⁶⁰ KANTOROWICZ, *Studies*, 48. This text has been given this title by Kantorowicz himself in this work.

⁶¹ "[L]a regola equa, o giusta che sia, non è sempre riassunta nella norma legale" (ROTA, "Concezione irneriana," 256).

⁶² As recorded in *Dig.* I.1.5.

⁶³ SCHULZ, *History of Roman Legal Science*, 295-299, deals with the Hellenistic revival in bureaucratic Roman jurisprudence of the Justinianic period. He notes that, in this period, "jurisprudence ... was strongly influenced by Hellenism, so strongly, indeed, that one may almost speak of a second Hellenistic period" (p. 295).

⁶⁴ See *ibid.*, 74 for a discussion of Hellenism and its influence in law.

⁶⁵ *Ibid.*, 297.

⁶⁶ VINOGRADOFF, *Roman Law*, 33.

different from nature was also introduced. The result contributed to the eventual scholastic reformulation of relations between man and the world, especially as reflected in new economic theories of value. In fact, through Irnerius's subtle distinction of *aequitas*, *iustitia*, and *ius*, he avoids that tendency which Gaines Post and the economist Joseph Schumpeter note in the medieval conception of law, namely, the confusion of *ius gentium* and *ius naturale* (the first common to man alone, the latter to all creation).⁶⁷

In sum, for Irnerius *aequitas* implies "il superamento delle accidentalità umane della norma," that is, of mere human laws.⁶⁸ It establishes the ground of justice for the determination of all questions about just and unjust laws. This ground furthermore is divine, not accidental, and thus gives formative and corrective shape to any and all human laws. Irnerius makes clear the need for the theological shape of jurisprudence. However, laws such as those found in the *Corpus iuris civilis* are the sacramental vestment that make it possible to reveal the necessary ground of law in *aequitas* understood as a necessary universal. Thus, Irnerius stands on the threshold of an art that allows the utilization of Roman law by the Church and provided a structure in which canon law could develop.⁶⁹

Conclusion

"Modern jurisprudence [began] with Irnerius."⁷⁰ I have suggested that it does because of Irnerius's new legal art based not only on the discovery of new texts but primarily on his use of new tools. The new texts included not just the *Digest* but also new grammatical, rhetorical, and philosophical tradents. As to tools, Radding's conclusion about the newness of Irnerius's work and that of the school of Bologna is correct: the break with how legal science had been understood and performed in the pre-Irnerian period occurred "with the invention of new methods of thinking about law."⁷¹

⁶⁷ GAINES POST, *Studies in Medieval Legal Thought: Public Law and the State, 1100–1322*, Princeton, Princeton University Press, 1964, 541; JOSEPH A. SCHUMPETER, *History of Economic Analysis*, introd. by ELIZABETH BOODY SCHUMPETER, New York, Oxford University Press, 1954, 108.

⁶⁸ ROTA, "Concezione irneriana," 242.

⁶⁹ LE BRAS, *Histoire*, 31 deals with this point in relation to the usage to which canonical jurists put Roman law.

⁷⁰ SCHULZ, *History of Roman Legal Science*, 100.

⁷¹ RADDING, *Origins*, 185.

I have sought to suggest something of the genesis of those new methods and to provide some examples of the method in action, something that Radding does not do in any detail. This is surprising since the nascent application to legal science of a broader set of tools drawn from the liberal arts—tools that include preeminently ways of getting at comparisons and blends—is the very kind of thing that Radding is looking for in his study, namely, an exploration of how the legal mind develops and works.⁷²

Toward that end, I hope to have made a contribution by explaining how his approach is drawn from the liberal arts, applied not just to rules but to the principles found in the *Codex*, and how, in doing so, he is able to formulate valid confines and limits for legal studies by charting the methodological bases for analysis and by providing the dialectical grounds for further developments of the meaning of and relationships between *aequitas*—*iustitia*—*ius* in the context of a new legal art.

I believe that approach is entirely consistent with Irnerius's self-understanding of his curriculum. As Kantorowicz noted, quoting Celsus's definition *ius est ars boni et equi* as it was picked up in Irnerius's gloss on *iuris prudentia*, "legal science is able to give precision—"artare"—to ethical rules," because, for Irnerius, "legal science had become the methodical prototype of every other normative science, a truth with which even modern scholars are far from familiar."⁷³ In one sense, the circumstances that produced Irnerius as an interpreter through the gloss of the *Corpus* provided for their resolution in the later adoption of this universality. The study of medieval legal hermeneutics and art continues to remain valuable for our understanding of the development of law, the philosophy of law, and canon law specifically.

⁷² Two of the best, accessible studies on how the mind itself works are Gilles FAUCONNIER and Mark TURNER, *The Way We Think: Conceptual Blending and the Mind's Hidden Complexities*, New York, Basic Books, 2003, which focuses on the mind's conceptual blending, and Steven PINKER, *How the Mind Works*, New York, W.W. Norton, 1997, which, though it ranges more broadly than the work of Fauconnier and Turner, still returns throughout to the "syntactic, compositional, combinatorial abilities" of the mind (Pinker, *How the Mind Works*, 564), features that lie at the very heart of the foundation of the medieval arts of the trivium and here in their application to law.

⁷³ KANTOROWICZ, *Studies*, 63. For Irnerius, law as *ars boni et equi* means that law gives precision (*artat*) to the ethical rules of the philosophers: *Bonum et equum artari non potest nisi iusti scientia vel iniusti* (IRNERIUS, *Exordium*, paragraph 4).

NOTE SUR LE CONCEPT ET L'UTILITÉ DE LA SENTENCE CANONIQUE

ARMAND PAUL-JOSEPH BOSSO

RÉSUMÉ — La nature de cette contribution, comme indiqué à l'en-tête, est un aperçu synthétique à visée didactique sur le concept de la sentence canonique. En effet ce concept connaît de multiples approches d'un auteur à un autre. Notre objectif n'est pas de trancher prétentieusement le débat. Nous voulons seulement apporter des orientations d'ordre doctrinal qui aident à se faire une idée cohérente autour de cet acte institutionnel des procédures judiciaires canoniques. Notre souhait serait que cette brève étude serve de base à un solide approfondissement pour ceux qui en ressentiront le besoin.

SUMMARY — This study is a synthetic overview, for educational purposes, on the concept of the canonical sentence. Indeed, there are multiple approaches on this concept from one author to another. The author's goal is not to settle the debate. Rather, he provides a scholarly guide to help form a coherent idea about this fundamental act of canonical judicial procedure. The study may thus serve as a basis for a solid and deeper appreciation of the topic for those who may have need of it.

Introduction

Dans l'actuel ordonnancement canonique, les allusions à la sentence, en tant que vocable de droit, sont perceptibles des canons 1607 à 1655 et 1713 à 1728 du livre VII. Ces derniers présentent une description de ses différentes natures au cœur du mécanisme processuel canonique. Cependant, il n'est pas aisé de saisir au premier abord le sens intrinsèque du mot, son contenu spécifique selon l'entendement du législateur, ce dernier n'en donnant pas une définition explicite. Cette option pourrait se justifier par deux thèses. D'une part, le législateur ne faisait pas œuvre de doctrine en établissant un ensemble de normes processuelles. Son intention était de porter un code de procédures, utile par ses indications, au déroulement des procès canoniques. Ce faisant, il accorde des marges à la doctrine en vue d'étoffer

le contenu spécifique de certains concepts, sur les bases d'analyses d'éléments internes et externes aux dispositions émises¹. De l'autre, il s'agit d'un choix méthodologique. La définition de la sentence ne saurait être figée, puisqu'elle se déduit des différents éléments que l'on trouve disséminés, comme les pièces d'un puzzle, dans les passages des canons 1607 à 1618 du livre VII sur le « *De processibus* ». De la sorte, le législateur offre la possibilité, suite à un raisonnement déductif de la lecture des normes, de se faire une idée de toute la notion.

La logique de la présente étude se conformera au postulat méthodologique classique appliqué à l'analyse des concepts juridiques : une définition des notions, la perception de leurs caractéristiques et les divers enjeux possibles. Elle comporte l'avantage d'une part d'être située dans la perception qu'il sied de retenir de la sentence canonique et de ses distinctions fondamentales face à tout autre document de nature judiciaire. Sur ce sujet, les canonistes rivalisent par leur démonstration. Nous en dégagerons un aperçu synthétique. D'autre part, elle nous fait saisir l'importance de l'acte dans le système processuel canonique, pour en mesurer la véritable portée.

1 — *Le concept et les caractéristiques de la sentence canonique*

Cette section doctrinale aura pour but l'examen substantif du concept de sentence dans l'ordonnancement canonique. Dans son approche, nous impliquerons essentiellement une démarche déductive vu le recours, que nous aurons à faire, aux éléments externes au code en vigueur, dans notre volonté de cerner la notion. Nous évoluerons également en suivant des procédés herméneutiques et analytiques, dans l'étude du référent normatif du concept au canon 1607. Cette dynamique comporte l'avantage d'un réel approfondissement offrant toutes ses subtilités.

1.1 — Le recours aux éléments externes au CIC

Notre tentative de saisir le concept spécifique de la sentence canonique tiendra compte de la doctrine en ayant recours à des éléments pris en dehors du contexte juridico-canonique et du code actuel que sont ici le droit civil (sans entrer dans ses particularismes), le code Pio-Bénédictin, le Magistère pontifical, l'opinion de quelques experts de la doctrine processuelle canonique pour aboutir aux diverses caractéristiques fournies par le CIC.

¹ Cf. M. J. ARROBA CONDE, *Diritto Processuale Canonico*, 6^{ème} éd., Rome, Ediurcla, 2012, 326.

1.1.1 — *En droit civil*

Dans les systèmes normatifs séculiers, la sentence dans son sens générique « désigne tout jugement, d'ordre judiciaire émanant d'une juridiction »². Cette définition situe la notion dans son aspect fonctionnel en tant qu'acte relevant de la seule compétence concédée par l'État à celui qui a le pouvoir d'appliquer le droit par voie judiciaire. Autrement dit, tous les jugements ne sont pas des sentences et tous les hommes au sein de la société ne peuvent les émettre, à l'exception de ceux dont la compétence est reconnue par l'État. Le mot jugement, en lui-même, nous projette dans l'une des étymologies latines de la sentence qui, dérivant du verbe *sentire*, se réfère à la formulation d'une opinion, d'un avis, d'où son caractère de réponse à un problème.

Dans les procédures civiles, la sentence se dit « du jugement rendu par les tribunaux d'instance et par les conseils de prud'hommes ainsi que les arbitres »³. Pour Rocco, elle est perçue comme un acte public⁴ purement intelligible du juge, par lequel, en appliquant la norme au cas concret et au moyen

² G. CORNU, « La sentence en France », dans UNIVERSITÀ DEGLI STUDI DI FERRARA (dir.), *La sentenza in Europa, Metodo, Tecnica e stile*, Atti del Convegno internazionale per l'inaugurazione della nuova sede della Facoltà di Giurisprudenza, Ferrara, 10-12 ottobre 1985, Padou, Casa Editrice Dott. Antonio Milano, 1988, 159. En outre, le terme "sentence" est polysémique surtout au regard des époques de l'histoire humaine. À l'époque romaine, il était associé à l'idée de jugement. Pendant les siècles du haut Moyen-Âge, son sens équivalait à la peine (capitale). Dans le Droit Canonique, il indiquait plutôt l'excommunication. À partir du XI^{ème} siècle, avec l'abondance du volume des actes à l'occasion des plaid, l'idée de sentence est étroitement liée à la notion de jugement. Au cours des XIV^{ème} et XV^{ème} siècles, les juges assignent à la notion de sentence l'idée d'un accord, qui consiste en un accommodement entre des parties. Plus tard au XVII^{ème} siècle, Furetière définira la sentence comme un jugement qui est rendu sur quelques différends par des juges inférieurs. Au XIX^{ème} siècle, le *Littré*, sur les définitions de Furetière, mettra en exergue le sens moral de la sentence. Aujourd'hui, le sens judiciaire du mot est enfin passé au premier plan dans les dictionnaires (décision; verdict), mais pour autant, il n'a pas perdu sa connotation de « maxime » ou de « précepte ». Cf. B. GARNOT et B. LEMESLE (dirs.), *Autour de la sentence judiciaire, Du Moyen-Âge à l'époque contemporaine*, Dijon, Éditions Universitaires de Dijon, 2012, 5-16.

³ S. GUINCHARD, « La sentence », dans T. DEBARD et al. (dirs.), *Lexique des termes juridiques 2014-2015*, 22^{ème} éd., Paris, Dalloz, 914.

⁴ À propos de son caractère public : « *La sentenza viene descritta quale atto pubblico a contenuto vincolato. Dall'essere atto pubblico, consegue la imperatività dell'atto, ossia la sua idoneità a incidere in modo immediato sulle situazioni giuridiche soggettive : si descrive, quindi, il regime degli effetti del provvedimento come pure il fondamento ultimo della sua peculiare disciplina procedimentale* » : A. CHIZZINI, « Sentenza nel diritto processuale civile », dans *Digesto delle discipline Privatistiche, Sezione civile*, 4^{ème} éd., vol. 18, Turin, Unione Tipografica Editrice Torinese (= UTET), 1998, 240.

des organes judiciaires, l'État assure la protection juridique des droits objectifs et subjectifs⁵. Selon Chiovenda, elle est « une disposition du juge qui, accueillant ou ajournant la demande de l'acteur [d'un procès], affirme l'existence ou l'inexistence d'une volonté concrète de loi qui lui garantisse un bien; l'inexistence ou l'existence d'une volonté de loi qui la garantisse au convenu »⁶. Ces deux appréciations sont complémentaires, en tant qu'elles présentent l'acte dans son aspect rationnel et volitif. À la vérité, en prononçant une sentence, le juge greffe sa volonté sur celle du législateur en appliquant les normes stipulées par le texte de lois pour le cas précis, objet du procès.

Les juristes experts du droit civil sont unanimes à reconnaître que, par sa position, la sentence est foncièrement « l'acte qui met fin au rapport processuel »⁷, en concluant toutes les activités qui se sont déroulées pendant les phases d'instruction et de délibération. La sentence est l'acte définitif du procès pour l'instance qui lui aura servi de cadre de déroulement.

1.1.2 — *Le canon 1868 du CIC/17 et le Magistère pontifical*

Dans le code Pio-Bénédictin régentant la précédente législation canonique, la définition de la sentence se saisit sans ambages au canon 1868 § 1 qui énonce ce qui suit : « Legitima pronuntiatio qua iudex causam a litigantibus propositam et iudiciali modo pertractam definit »⁸. Elle est le prononcé légitime au moyen duquel le juge définit une cause proposée par des adversaires et traitée judiciairement. Sous cette perspective, la sentence est strictement entendue comme un acte de justice enraciné sur des bases législatives et un mode judiciaire de définition des litiges. Elle comporte un élément logique et un autre impératif⁹, tous deux en parfaite corrélation. Avec l'élément logique, le juge rend compte des résultats de sa recherche de la vérité face à la petitio initiale et décide en définissant la cause.

⁵ Cf. A. DA ROCCO, *La sentenza civile*, Milan, Giuffrè, 1962, 225.

⁶ G. CHIOVENDA, *Istituzioni di diritto processuale civile*, 3^{ème} éd., vol. 1, Naples, Jovene, 1947, 142.

⁷ IDEM, *Principi di diritto processuale civile*, 3^{ème} éd., Naples, Jovene, 1923, 891; voir également F. LANCELLOTTI, « La sentenza civile », dans A. AZARA et al. (dirs.), *Novissimo digesto italiano*, 4^{ème} éd., vol. 16, Turin, UTET, 1110.

⁸ M. LEGA et V. BARTOCETTI (dirs.), *Commentarius in iudicia ecclesiastica iuxta Codicem Iuris Canonici*, vol. 2, Rome, Anonima Libreria Cattolica Italiana, 1950, 928.

⁹ Ce rapport a été mis en exergue dans la dialectique entre la *ratio* et l'*imperium* concernant la relation *favor veritatis* et *favor iudicis*. Il a trouvé tout son sens dans la motivation de la sentence. Cf. J. LLOBELL, *Historia de la motivación de la sentencia canónica*, Zaragoza, Caja de Ahorros y Monte de Piedad, 1985, 57-62; 66-69; 79-80; 83-93; 103-106; 169-177.

L'impératif caractérise la disposition judiciaire, en imposant aux parties la solution qui définit la controverse¹⁰.

Par ailleurs, dans les allocutions des Pontifes à la Rote romaine, qui sans conteste intègrent le Magistère de l'Église¹¹, le pape Pie XII, au sujet de la sentence, a fait œuvre de doctrine. Lors de son discours du 2 octobre 1944, rappelant l'impact de la décision de justice dans la vie des hommes, le Pontife Romain présentait la sentence comme ce prononcé qui « affirme et fixe juridiquement la vérité [en tant que fin ultime du procès judiciaire], en lui donnant valeur légale »¹². Plus tard, brandissant des recommandations de principe dans le traitement des causes de nullité matrimoniale, ce même pape rappellera aux auditeurs de la Rote que : « Dans la sentence, le juge décide du cas spécifique selon la loi. (...) [Elle consiste à] comprendre strictement la norme juridique dans le sens du législateur et à analyser rigoureusement le cas spécifique par rapport à la norme à appliquer. (...) Sans ce procédé, la sentence du juge serait un simple ordre et non ce que la parole “droit positif” veut exprimer »¹³. L'utilité de ces définitions magistérielles provient de ce qu'elles offrent des indications quant aux facettes de la sentence et la quintessence de sa constitution.

1.1.3 — *La doctrine canonique actuelle*

En parcourant quelques ouvrages de droit processuel glosant le code en vigueur à la recherche d'une définition de la sentence judiciaire au for canonique, on serait de prime abord tenté de croire que la plupart des auteurs n'ont pas voulu s'y risquer, en raison de leur fidélité aux lignes préétablies, qui en donne une description en lieu et place d'une définition de principe

¹⁰ Cf. F. DELLA ROCCA, « Sentenza in Diritto Canonico », dans *Novissimo digesto italiano*, vol. 16, 1103; F. RAMOS et P. SKONIECZNY (dirs.), *Diritto processuale canonico*, 3^{ème} éd., vol. 2, Rome, Angelicum University Press, 2014, 23-25.

¹¹ Cf. J. LLOBELL, « Sulla valenza giuridica dei discorsi del Romano Pontefice al Tribunale Apostolico della Rota Romana », dans *IE*, 17 (2005), 547-564. Il défend l'idée selon laquelle les allocutions des Papes comportent cette idonéité à créer des normes à caractère contraignant pour ceux envers lesquels elles sont émises.

¹² PIUS XII, Allocutio ad Prælatos auditores ceterosque officiales et administros Tribunalis Sacræ Romanæ Rotæ necnon eiusdem Tribunalis Advocatos et Procuratores, 2 octobre 1944, dans AAS, 36 (1944), 284, n. 2.

¹³ IDEM, Allocutio ad Prælatos auditores ceterosque officiales et administros Tribunalis Sacræ Romanæ necnon eiusdem Tribunalis Advocatos et Procuratores, 29 octobre 1947, dans AAS, 39 (1947), 496.

assez formelle. Ainsi, J. García-Faílde¹⁴, C. Morán-Bustos¹⁵, F. Ramos¹⁶, L. Chiappetta¹⁷ pour ne citer que ceux-là, se sont-ils limités en des paraphrases de la norme contenue au canon 1607. Toutefois, chez d'autres, il s'observe une approche plus démonstrative. Pour P. PINTO par exemple : « la sentence est la réponse judiciaire donnée à la controverse entre les parties, dont l'objet fut décidé et circonscrit dans la *litis instantia*. Par elle, le juge conclut seulement *quod petitum est*, c'est pourquoi, il ne peut s'engager *nec ultra nec infra* »¹⁸. Pour Diego-Lora :

*Se ha querido ver la sentencia como el acto del órgano judicial por el que este emite un juicio de conformidad o de disconformidad a lo que las partes han pedido en sus actos de pretensión y de oposición respectivamente. En realidad, viene a ser la respuesta afirmativa o negativa hecha, a modo de juicio, a las peticiones formuladas por las partes en el proceso, peticiones fundadas en unos hechos que se alegan, por una y otra parte, y en un derecho aplicable, también a juicio de ambas partes, al efecto que pretendan : alcanzar un resultado favorable a sus peticiones respectivas*¹⁹.

Substantiellement, cette définition pourrait se résumer avec cette autre réflexion de Pompedda indiquant l'acte comme « ce prononcé légitime de la part du juge par lequel il définit la cause proposée par les parties, traitée et considérée selon les normes judiciaires »²⁰. Cette position retient l'assentiment de Turnaturi²¹. En outre, Andriano nous instruit sur son caractère par sa définition du terme : « D'acte solennel du juge ou du tribunal collégial par lequel on décide de manière définitive de l'objet de la controverse. La sentence doit répondre à tous et à chaque élément de droit et de fait requis

¹⁴ Cf. J. GARCÍA FAÍLDE, *Nuevo derecho procesal canónico, Estudio sistemático-analítico comparado*, Salamanca, Universidad Pontificia de Salamanca, 1984, 162-163.

¹⁵ Cf. C. MORÁN-BUSTOS, *Nullidad de matrimonio y proceso canónico, Comentario adaptado a la instrucción "Dignitas connubii"*, Madrid, Dykinson, 2007, 422-423.

¹⁶ Cf. F. RAMOS et P. SKONIECZNY (dirs.), *Diritto processuale canonico*, 23-24.

¹⁷ Cf. L. CHIAPPETTA, *Il Codice di Diritto Canonico, Commento giuridico-pastorale*, 3^{ème} éd., vol. 3, Bologne, Edizione Dehoniane Bologna, 2011, n. 5556.

¹⁸ P. V. PINTO, *I processi nel Codice di Diritto Canonico, Commento sistematico al lib. VII*, Cité du Vatican, Pontificia Università Urbaniana, 1993, 387.

¹⁹ C. DE DIEGO-LORA et R. RODRÍGUEZ-OCAÑA (dirs.), *Lecciones de derecho procesal canónico, Parte general*, Pamplona, Ediciones Universidad de Navarra S.A. (EUNSA), 2012, 383.

²⁰ Cf. M. POMPEDDA, « Decisione-sentenza nei processi matrimoniali : del concetto e dei principi per emettere una sentenza ecclesiastica », dans IDEM (dir.), *Studi di diritto processuale canonico*, Milan, Giuffrè, 1995, 157.

²¹ Cf. E. TURNATURI, « Verità ed esecutività della sentenza dopo una duplice decisione conforme », dans P. A. BONNET et C. GULLO (dirs.), *Verità e definitività della sentenza canonica*, Studi Giuridici 46, Cité du Vatican, LEV, 2008, 559-560.

par les parties et formellement synthétisé dans la concordance du doute »²². Enfin, Arroba Conde présente la sentence comme :

Un acte processuel qui appartient exclusivement au juge et qui a pour objet la définition ou la décision sur la matière qui lui a été soumise. La substance de cet acte est l'émission d'un jugement relatif à la conformité ou non de la revendication de la partie avec le droit objectif (...). La sentence peut être définie comme le prononcé légitime relatif à une cause traitée judiciairement, c'est-à-dire en suivant l'*iter* processuel prévu²³.

L'analyse de ces définitions oblige cependant à des observations : d'abord, l'absence de rapport dans la tentative d'identification du document, en référence aux autres actes judiciaires pouvant émaner de l'*iter* processuel canonique; ensuite, le peu d'intérêt accordé à son aspect matériel, sa forme externe qui en tout état de cause est un élément lui conférant de l'efficacité.

La sentence canonique est avant tout une parole d'autorité, qui fait effectivement prééminence là où d'autres paroles – comme l'aveu judiciaire, le témoignage ou la plaidoirie – seraient mises en cause²⁴. Cette mention se justifie, d'autant plus qu'au cours du procès on note plusieurs interventions. Valerio Andriano, dans son apport, confère à la sentence la qualité d'acte solennel, c'est-à-dire public, officiel. Toutefois, l'approche de la notion d'autorité est différente en tant que pouvoir intrinsèque contenu dans la norme édictée qui incline à l'obéissance²⁵. En effet, la solennité d'un acte ne suffit pas obligatoirement à lui conférer de l'autorité. La solennité dérive de l'aspect *in rito* de l'acte. Tandis que l'autorité engage celui *in merito*. D'où le besoin d'adjoindre cette considération aux tentatives de définitions de la sentence canonique.

Quant au critère relatif à sa forme externe, il n'est pas superflu de rappeler que la sentence doit être écrite pour être authentifiée et efficace (c. 1472 § 1). « C'est un moyen d'éviter tout doute sur sa consistance, et d'assurer sa conservation »²⁶. Il ne s'agit pas uniquement d'un prononcé, qui le réduirait à un discours à l'audience conclusive d'un procès. C'est un point sur lequel

²² V. ANDRIANO, « Tutela dei diritti delle persone », dans GRUPPO ITALIANO DOCENTI DI DIRITTO CANONICO (dirs.), *Il diritto nel mistero della Chiesa*, 3^{ème} éd., vol. 3, Rome, Lateran University Press, 2004, 599-601.

²³ M. J. ARROBA CONDE, *Diritto processuale canonico*, 523.

²⁴ Cf. A. FOSSIER, « Grâce, mesure et discipline. Les sentences de la pénitencerie apostolique (XIII-XIV^{ème} siècles) », dans B. GARNOT et B. LEMESLE (dir.), *Autour de la sentence judiciaire*, 19-20.

²⁵ Cf. C. DE DIEGO-LORA, Commentaire du canon 1611, dans Á. MARZO et al. (dirs.), *Comentario exegético al Código de Derecho Canónico*, 3^{ème} éd., vol. 4/2, Pamplona, EUNSA, 2002, 1566.

²⁶ R. NAZ, « Sentence », dans *DDC*, vol. 7, 958.

Gratien insiste tout particulièrement en ces termes : « *Quod autem dicitur, quia nichil scriptis iudicatum est, legendum est tit. XLIV, libri VII codicis constitutio ultima, quia scriptis debuit iudicari. Nam ibi inter alia precipitur, ut sententia, que sine scripto dicta fuerit, nec nomen sententiæ habere mereantur* »²⁷.

En somme, il se dégage de cet *excursus* que la sentence dans sa nature serait ce *dictio* rationnel légitime, par lequel le juge, dans les limites de sa compétence ou de son pouvoir de juridiction, en définissant une cause proposée par les parties exprime la volonté du législateur, assure la protection des droits et porte un terme au procès²⁸. La sentence d'un juge ecclésiastique demeure toujours une opération subjective – parce que relative au sujet en tant qu'entité singulière – qui assume cependant un caractère public du fait qu'elle est un acte de juridiction accompli au nom des pouvoirs que l'Église en tant qu'institution confère à une personne. Bien distincte de la preuve, la sentence fait valoir toute la légitimité du juge par rapport aux parties et aux témoins. Elle est parole d'autorité, là où la parole des autres acteurs du procès tels que le défenseur du lien et l'avocat en la cause, peut être mise en doute. Enfin, la sentence doit être écrite pour être authentifiée et efficace.

1.2 — Le dispositif du canon 1607 du CIC

Le passage du code Pio-Bénédictin au code en vigueur, a vu l'une des perspectives de l'ex canon 1686 être abandonnée au profit de celles du nouveau canon 1607²⁹. La notion de sentence est perçue sous un angle descriptif, qui présente l'intérêt de dévoiler sa nature spécifique et ses différents caractères. De ce fait, il se lit au dit canon : « *Causa iudiciali modo pertractata, si sit principalis, definitur a iudice per sententiam definitivam; si sit incidens, per sententiam interlocutoriam, firmo præscripto can. 1589 § 1* » (c. 1269 § 1 CCEO). Cette approche met en avant trois éléments spécifiques : 1° la sentence comme le résultat d'un acte foncièrement judiciaire; 2° son

²⁷ GRATIANUS, II, 1, 7, Col. 442.

²⁸ « *Sententia est præcipua iudicii pars ad quam ceteræ processus iudicialis partes referuntur; omnes enim huiusmodi partes finem habent edocendi iudicem ut quid de causæ controversia sententiam sit ipse pronuntiet, iudicio de eo sibi lucide efformato* » : G. COCCHI, *Commentarium in Codicem Iuris Canonici*, vol. 4, Turin, Marietti Editore, 1930, n. 215.

²⁹ Lors des travaux préliminaires à la constitution du CIC, au sujet du canon 1868 du CIC/17, les consultants à l'assemblée du 12 décembre 1978 n'ont pas jugé idoine de reporter la définition qu'elle donnait de la sentence. Leur attention s'était plutôt tournée vers l'ajout de la mention « *firmo præscripto can. 245, § 1* » dans la constitution de l'actuel canon 1607. Cf. PONTIFICIA COMMISSIO CODICI IURIS CANONICI RECOGNOSCENDO, « Can. 265 (CIC 1868) », dans *Comm*, 11 (1979), 138.

caractère irrévocable, si elle définit une cause principale et 3° celui interlocutoire, lorsqu'elle répond à une question incidente.

1.2.1 — *La provenance judiciaire de la sentence*

La spécificité de la sentence est sa réponse à une *causa iudiciali modo pertractata*. Dans cette précision, l'élément essentiel est l'expression "*iudiciali modo*", dont nous analyserons l'un après l'autre les éléments.

En effet, le terme "*iudiciali*" dérive de "*iudex*" qui veut dire juge. Etant formé à l'origine de la jonction des termes *ius* et *dicere*, il désigne la constitution du droit dans la résolution de la controverse ou mieux, le fait de rendre la justice. Par essence, le juge est celui qui est muni du pouvoir de rendre la justice en vue de résoudre une controverse³⁰. Sa juridiction ne s'étend qu'à la justice rendue à ceux qui sont en procès selon les normes et l'ordre judiciaire canonique, au moyen de l'émanation d'une décision³¹. Quant au terme "*modo*", il désigne la voie, la manière, le moyen. Il renvoie à un fil conducteur permettant le déroulement d'une action. De manière générale, en parlant de *modo* en droit processuel, on ne s'intéresse qu'à l'aspect procédural d'un acte. Ainsi, le contenu de "*iudiciali modo*" nous oblige à considérer l'*iter* consistant à rendre la justice, c'est-à-dire le formalisme processuel.

Suivant cette orientation, la voie judiciaire à laquelle le canon fait allusion est celle propre aux développements des procédures dans le traitement des causes canoniques. Elles comportent les phases introductive, instructive, discursive, avec la mise en œuvre des acteurs nécessaires, pour se conclure avec la phase décisionnelle d'où émerge la sentence³². Le juge, définissant une cause suivant ce *modus agendi*, intervient dans une sphère strictement judiciaire. Sa décision revêt à la fois la nature et la qualité de sentence. Toutefois, il subsiste une nuance de caractère. Au titre VII du livre VII, le législateur emploie l'expression « *De iudicis pronuntiationibus* » pour désigner aussi bien la sentence que les décrets en tant qu'actes judiciaires. Ce qui veut

³⁰ Cf. C. DE DIEGO-LORA, « Función de justicia en la Iglesia », dans *IC*, 16 (1976), 287-316; F. DANEELS, « De tutela iurium subiectivorum : quæstiones quædam quoad administrationem iustitiæ in Ecclesia », dans PONTIFICIUM CONSILIUM DE LEGUM TEXTIBUS INTERPRETANDIS, *Ius in vita et in missione Ecclesiæ*, Cité du Vatican, LEV, 1994, 175-192.

³¹ Cf. A. STANKIEWICZ, « I doveri del giudice », dans R. FUNGHINI (dir.), *Il processo matrimoniale canonico*, Studi Giuridici 17, Cité du Vatican, LEV, 1988, 115; M. POMEDDA, « Il giudice ecclesiastico », dans *QSR*, 13 (2003), 21-34.

³² Cf. les cc. 1501-1691. Ces normes ont été révisées en certains articles par les nouvelles réformes : FRANCISCUS, m.p. *Mitis Iudex Dominus Iesus*, 8 septembre 2015, dans *OR*, 155, 204 (2015), 4-5.

dire que, tous les actes du juge ne recouvrent pas la nature de sentence. Il existe également le décret. Par définition, il s'agit d'un « prononcé légitime du juge en rapport avec une cause non traitée judiciairement pour laquelle l'*iter* processuel ne s'est pas déclenché au moyen d'une instruction spécifique, mais par un échange des argumentations ou des mémoires sur l'objet en discussion »³³. Les décrets qui interviennent dans le cours des procès canoniques, peuvent être soit de nature décisoire, soit de pure ordonnance émise en vue de l'évolution du procès. En cela, elles se distinguent des autres expressions du pouvoir de juridiction qui procèdent ou de la fonction législative, ou de celle exécutive³⁴.

Le décret ordinaire contient exclusivement la décision du juge relative à l'ordre et au mode de déroulement d'un procès. Il ne requiert pas une motivation particulière. Au nombre de ces décrets, nous discernons ceux qui admettent les demandes, ordonnent, impulsent le procès et prescrivent la communication des diverses décisions. Le décret ordinaire peut être objet de recours à cause de sa non-conformité à la norme canonique. Celui-ci s'effectue devant le même juge qui les a édictés³⁵. Le décret décisoire définit les questions de droit substantif ou processuel de nature incohérente pouvant émerger au cours du procès³⁶. Il se distingue des sentences interlocutoires en mettant fin aux questions d'importances mineures qui interviennent durant le procès. Il nécessite une motivation. Au nombre des décrets décisores, il faut mentionner le *decretum ratihibitionis*, confirmant une sentence de nullité émise en première instance (c. 1682 § 2; *CCEO* c. 1368; *DC* art. 265)³⁷. Depuis la *Mitis Iudex* (= *MI*), il n'émane plus de l'institution de la *conformitas sententiarum*, mais de l'appel des parties dans les délais indiqués par le droit (*MI* c. 1679). Ce motif particulier lui confère la qualité de décret définitif. En substance, l'expression « *causa iudiciali modo pertractata* » mis au premier plan du canon 1607, signifie que « la décision du juge ne sera considérée véritablement comme une sentence que dans la mesure où en concluant un procès, elle est le terme d'une action judiciaire »³⁸.

³³ M. J. ARROBA CONDE, *Diritto processuale canonico*, 524.

³⁴ Cf. P. V. PINTO, *I processi nel Codice di Diritto Canonico*, 379; C. MORÁN-BUSTOS, *Nullidad de matrimonio y proceso canónico*, 422-423.

³⁵ Cf. J. GARCÍA FAÏLDE, *Nuevo derecho procesal canónico*, 167.

³⁶ Sur la différence entre les décrets décisores et les décrets ordinaires, voir M. J. ARROBA CONDE, *Diritto processuale canonico*, 484-485.

³⁷ Cf. B. UGGÉ, « Il decreto di conferma di una sentenza affermativa », dans *QDE*, 27 (2014), 158-186.

³⁸ G. KEMA, *La sentence ecclésiastique dans le système judiciaire canonique, Synthèse de la jurisprudence de la Rote romaine en matière d'incapacitas assumendi* (c. 1095, n. 3) de 1990-2010, Rome, Pontificia Università Urbaniana, 2013, 18.

1.2.2 — La sentence définitive

Selon les teneurs du canon 1607, une « *causa (...), si sit principalis, definitur a iudice per sententiam definitivam* ». Il s'agit là d'une norme à interprétation stricte. En effet, la sentence définitive est incluse au titre des prononcés judiciaires que le législateur admet. Sa singularité réside en son rapport intrinsèque avec la cause principale. Dans les procès canoniques, la *causa* se dit de l'objet du contentieux à résoudre. Il est autrement désigné sous les vocables de *petitio* ou de *actio*. Dans le déroulement du contentieux ordinaire, la *causa principalis* se détermine pendant la concordance du doute dans la phase introductive du procès. Elle constitue la question de fond que la mise en œuvre du procès cherche à élucider³⁹. C'est la raison pour laquelle la sentence définitive se qualifie par ailleurs de sentence *in merito*, étant une réponse directe à la substance d'une cause.

La quintessence de « *definitiva* », adjointe à la sentence, met en relief son caractère de conclusion des actes processuels selon les instances. Il n'est pas à confondre avec celui de la *res iudicata*⁴⁰. Ainsi, une cause conclue judiciairement au moyen d'une sentence définitive est-elle tranchée de manière irrévocable pour l'instance dans laquelle elle a été émise. En prononçant son jugement, le juge s'en trouve ainsi dessaisi et ne peut plus, par principe, revenir sur ce qui a été défini⁴¹. Ce qui justifie l'appel au tribunal supérieur au titre des moyens mis à disposition pour attaquer une sentence. En outre, le caractère définitif de la sentence lui procure force de loi particulière pour ceux en direction desquels elle a été émise (c. 16 § 3, CCEO c. 1498 § 3). Dans la doctrine processuelle canonique, il s'applique également à la sentence passée en force de « chose jugée ». Ce type de sentence est de fait inattaquable, à l'exception d'une *restitutio in integrum* selon les termes du canon 1645⁴².

La sentence définitive s'impose toujours au terme du procès judiciaire, à moins qu'un changement de perspective n'intervienne au profit de la voie administrative, comme il advient de la concession de la dispense *super rato*,

³⁹ Cf. K. LÜDICKE et E. JENKINS, « *Dignitas Connubii* », *Norms and Commentary*, Washington, Canon Law Society of America, 2006, 393.

⁴⁰ Cf. G. MONTINI, *De iudicio contentioso ordinario, De processibus matrimonialibus*, 4^{ème} éd., vol. 2, Rome, Pontificia Università Gregoriana, 2015, 450.

⁴¹ Toutefois, ce principe admet une exception formelle. Le tribunal ou le juge qui a émis une sentence peut rectifier ou corriger les erreurs matérielles qui se seraient glissées dans le texte aux normes du c. 1616 § 1.

⁴² Cf. A. BETTETINI, « *Stabilità della sentenza e sistema delle impugnazioni* », dans P. A. BONNET et C. GULLO (dirs.), *Il giudizio di nullità matrimoniale dopo l'istruzione "Dignitas Connubii"*, Parte prima : *I principi*, Studi Giuridici 75, Cité du Vatican, LEV, 2007, 422.

résultant de la non-consommation du mariage. La condition “*si*” apposée par le législateur dans la formulation du canon, exprime une hypothèse et non une faculté, en raison de l’existence d’une autre nature de sentence dite interlocutoire.

Le droit processuel canonique offre plusieurs catégories de sentences définitives. Nous distinguons celles estimatoire, absolutoire, démissoire, déclaratoire, constitutive et condamnatoire⁴³.

- La sentence *estimatoire* provient de la réponse affirmative du juge au doute convenu.
- La sentence *partiellement estimatoire* se présente quand le juge, confronté à plusieurs chefs de nullité, ne répond positivement qu’à un seul, réfutant les autres.
- Celle *absolutoire* ou “désestimatoire” n’accède pas aux requêtes du demandeur.
- La sentence *démissoire* indique l’absolution d’un coupable pour manque de preuves.
- La sentence *déclaratoire* se déduit de ses propriétés déclaratives. Elle vérifie ou déclare un droit existant. Elle assume plutôt une fonction de certification.
- La sentence *constitutive* met en œuvre la volonté concrète du juge d’introduire une norme novatrice au droit ou à une situation juridique existante. Elle se répartit en sentence de nature créatrice, modificative et extinctive. Créatrice, parce que visant un apport nouveau dans les droits ou les rapports juridiques; modificatrice, quand elle transforme le contenu d’un rapport juridique existant sans l’innover sensiblement; extinctive, quand elle a comme effet, l’annulation d’un rapport juridique.
- La sentence *condamnatoire* inflige une sanction *ferendæ sententiæ*.

Enfin, la sentence définitive peut être nulle et, de ce fait, sujette à une plainte en nullité (*querela nullitatis*)⁴⁴. C’est dire que seul ce dernier élément peut limiter sa valeur, sa mise en exécution et sa durée de vie.

⁴³ Cf. F. DELLA ROCCA, *Istituzioni di diritto processuale canonico*, Turin, UTET, 1946, 207-310; M. BONNEMAIN, « Sentencia definitiva », dans J. OTADUY et al. (dirs.), *Diccionario general de derecho canónico*, vol. 7, Pamplona, Aranzadi, 2012, 265.

⁴⁴ Cf. J. RAMOS, « La nullità insanabile della sentenza per un vizio attinente il giudice o la sua decisione (can. 1620) », dans ARCISODALIZIO DELLA CURIA ROMANA (dir.), *La “querela nullitatis” nel diritto canonico*, Studi Giuridici 69, Cité du Vatican, LEV, 2005, 89-179.

1.2.3 — *La sentence interlocutoire*

Le caractère de la sentence interlocutoire est particulier. Le canon le précise : « *causa (...), definitur a iudice (...); si sit incidens, per sententiam interlocutoriam* ». Autrement dit, liée à l'émergence d'une cause incidente, elle n'intervient que pour la définir. Cette norme donne à réfléchir sur le contenu intrinsèque du terme, ses différents caractères dans le procès judiciaire et enfin sur la question des causes incidentes.

L'expression "interlocutoire", du latin *inter-locutio*, dérive de *inter-loquor* et désigne « l'action d'interrompre »⁴⁵. Ce type de sentence s'entend donc comme celui qui, survenant au cours du procès, l'interrompt dans son cours ordinaire. Cette interruption intervient dans le but de résoudre une question particulière au regard de son importance et de son urgence, en relation avec la question principale objet du procès. La *praxis iudicialis canonica* fait apparaître deux types de sentences interlocutoires : l'une, dite simple, définit une cause incidente quelconque émergent à côté de la *petitio principalis*; et l'autre, aux allures d'une sentence définitive « parce que sans statuer sur la demande principale, elle a cependant pour effet de la paralyser ou de l'écarter »⁴⁶. Ce qui incline à dire qu'au canon 1618, tout en revêtant la forme interlocutoire, les sentences de ce type peuvent avoir cependant valeur définitive. Ces dernières devront être motivées succinctement pour leur validité (cc. 1617-1618 et 1629). Par principe, il est impossible d'interjeter appel contre une sentence interlocutoire simple, « car le juge peut les corriger et les révoquer avant la résolution de la cause finale »⁴⁷. Néanmoins à l'égard de celle définitive, le droit admet la possibilité d'engager un appel autonome, quand ce dernier porte exclusivement sur la sentence en question sans toutefois faire allusion à celle qui a servi à la résolution de la cause principale. Enfin, la sentence interlocutoire a un caractère facultatif dans le déroulement d'un procès, du fait qu'elle n'apparaît pas toujours. En effet, le législateur ne signifiant pas nécessairement sa présence au cours du procès, l'énonce sous une forme hypothétique : « *si sit incidens* ». À l'inverse, la sentence définitive, par sa nature conclusive, se pose comme une étape obligatoire à la validité de tout procès canonique.

La sentence interlocutoire intervient dans le traitement judiciaire d'une cause aux normes du canon 1587 : « après la citation qui ouvre le procès »

⁴⁵ C. DU CANGE, « Inter-locutio », dans *Glossarium mediæ et infimæ latinitatis*, Graz, Akademische Druck- u. Verlagsanstalt Graz, 1954, 1463.

⁴⁶ R. NAZ, « Sentence », dans *DDC*, vol. 7, 952-962.

⁴⁷ G. KEMA, *La sentence ecclésiastique dans le système judiciaire canonique*, 22.

et avant le décret de la *conclusio in causa*⁴⁸. La cause incidente à laquelle elle est intimement liée se perçoit comme : « les diverses questions controversées qui, bien que n'étant pas incluses dans le libelle introductif, ont un lien avec la question principale et demandent une décision judiciaire distincte »⁴⁹. Ainsi son sens juridique correspond-il à son étymologie, qui est la forme substantive du verbe *incidere* (tomber sur, survenir). Sur la nature de la cause incidente, la prudence du juge est engagée dans son discernement. Elle doit être évaluée en étroite relation avec la cause principale et se revêtir d'un caractère absolument primordial de sorte qu'elle soit nécessairement résolue avant la question de fond (c. 1589 § 1; CCEO c. 1269; DC art. 217)⁵⁰. Le mode de procédure dans le traitement des causes incidentes est abordé aux canons 1587-1591 (DC artt. 217-228). En procédure judiciaire, les causes incidentes peuvent porter sur l'incompétence ou la suspicion des juges, sur la capacité d'une partie à ester en justice, sur la contumace ou l'absence d'une partie au procès, sur le besoin d'entendre à nouveau des témoins, sur la saisie de la *res litigiosa*, sur l'intervention d'un tiers dans le procès et sur l'admission des preuves.

Somme toute, la méthode descriptive que le législateur emploie au canon 1607 révèle plutôt la consistance de son contenu, ses subtilités et ses différents caractères. La sentence est d'abord une décision de justice, qui définissant une question principale est dite définitive et interlocutoire pour une question incidente. Elle est marquée par un caractère rationnel du fait de sa connectivité intrinsèque à la *causa petendi* dont elle se doit d'être une réponse formelle, au risque de nullité.

2 — La nomenclature des sentences canoniques

Dans le *CIC*, on peut se rendre compte de la subtilité avec laquelle certains canons font des allusions parfois succinctes à l'existence de sentences de diverses natures. Ainsi distinguons-nous des sentences administratives (cc. 149 § 2; 1400 § 2), pénales (cc. 1726-1727), arbitrales (cc. 1713-1716) et rescisives (cc. 125-126).

⁴⁸ Cf. J. HUBER, « Le cause incidentali », dans H. FRANCESCHI et al. (dirs.), *La nullità del matrimonio : Temi processuali e sostantivi in occasione della "Dignitas connubii"*, Rome, Edizione dell'Università della Santa Croce, 2005, 178-180.

⁴⁹ L. MADERO, « Les questions incidentes », dans *CDCA* 3, 924.

⁵⁰ Cf. S. VILLEGIANTE, « Le questioni incidentali », dans P. A. BONNET et C. GULLO (dirs.), *Il processo matrimoniale canonico*, Studi Giuridici 29, 2^{ème} éd., Cité du Vatican, LEV, 1994, 662.

2.1 — La sentence administrative

La sentence administrative est l'émanation de la justice administrative⁵¹. Laquelle justice se définissant comme « le complexe de moyens que l'ordonnancement juridique met à disposition pour résoudre les conflits pouvant émerger entre autorité et fidèles »⁵², est dotée d'un champ de compétence bidimensionnelle.

Dans un sens large, elle comprend tous les moyens possibles pour réagir contre les décrets singuliers et les dispositions de l'administration publique, y compris la remontrance et l'opposition envers l'auteur de l'acte administratif, et le recours hiérarchique à l'encontre de son supérieur. Dans un sens plus restreint, la justice administrative est l'organe juridique qui dispose des moyens judiciaires pour dirimer les conflits entre le fidèle et l'organe de l'administration publique, à cause d'un décret singulier⁵³.

Par surcroît, à la compétence de cette justice particulière s'intègrent les contentieux-administratifs qui découlent de l'examen du recours en légitimité contre un acte administratif de la hiérarchie, quand ce dernier est fait sous la forme judiciaire par un véritable organe juridictionnel ou un tribunal proprement dit. Ainsi, les sentences qui découlent conséquemment de l'administration de l'exercice de la justice dans ces cadres définis sont appelées sentences administratives. Sur sa qualité formelle, le contenu de la sentence administrative est soit décisoire, soit dispositif⁵⁴. Le premier porte sur les exceptions⁵⁵ pré-judiciaires quant à la forme et sur le fond du recours. Ainsi, certaines sentences peuvent traduire par exemple des exceptions d'irrecevabilité

⁵¹ La justice administrative est « la totalité des moyens législatifs et constitutionnels, des structures et des remèdes juridiques dont l'administré peut légitimement se prévaloir pour faire respecter ses propres droits et intérêts en face de l'administration publique ». J. HERRANZ, « La giustizia amministrativa nella Chiesa, dal Concilio Vaticano II al Codice del 1983 », dans ARCISODALIZIO DELLA CURIA ROMANA (dir.), *La giustizia amministrativa nella Chiesa*, Studi Giuridici 24, Cité du Vatican, LEV, 1991, 14.

⁵² G. MONTINI, « Modalità procedurali e processuali per la difesa dei diritti dei fedeli, il ricorso gerarchico. Il ricorso alla Segnatura Apostolica », dans *QDE*, 3 (1995), 287-320.

⁵³ F. D'OSTILIO, *Il diritto amministrativo della Chiesa*, Rome, LEV, 1995, 386.

⁵⁴ Cf. A. ANDREANI, « Sentenza amministrativa », dans B. PARADISI et al. (dirs.), *Enciclopedia giuridica*, vol. 32, Rome, Istituto Poligrafico e Zecca dello Stato, 1994, 1-6.

⁵⁵ L'exception désigne le moyen de défense par lequel le défendeur ou l'autorité ecclésiastique (le promoteur de justice) tend à faire déclarer la procédure irrégulière ou éteinte, ou à en suspendre le cours, indépendamment de tout examen du fond du droit. Il pourra ainsi demander au juge de refuser d'examiner la prétention du demandeur parce que l'instance a été mal engagée (incompétence du tribunal, irrégularité d'un acte de procédure). Après décision sur l'exception, la procédure reprend son cours devant le même tribunal ou est recommencée devant lui ou devant un autre. Cf. S. GUINCHARD, « Exception », dans *Lexique des termes juridiques*, 441-442. Dans le *CIC*, les cc. 1462 et 1491-1500 disposent sur le concept.

pour la notification du recours en dehors des termes établis; des exceptions d'inadmissibilité, pour les irrégularités dans l'*iter* processuel tel que le manquement du droit à la défense; des exceptions de nullité pour le manque d'un élément essentiel du recours ou encore d'expiration du délai imparti pour le pourvoi relatif à un acte administratif. Quant à l'aspect dispositif, la sentence administrative se distingue en deux catégories fondamentales qui sont les sentences de rejet et celles de recevabilité d'un recours. C'est à travers ces éléments que réside toute sa singularité en rapport avec les autres types de sentences dont abonde le for canonique.

Substantiellement, la sentence administrative se soumet aux principes généraux édictés par le canon 1611. Elle s'accorde avec les demandes des parties exprimées dans la formulation du recours et approuvées au procès. Ensuite, elle détermine les obligations qui découlent du procès de sorte à les observer. Il s'agit d'un acte motivé quant aux faits sur lesquels elle se fonde et au droit qu'elle applique. Enfin, elle statue sur les coûts du procès. Le Tribunal Suprême de la Signature Apostolique est le seul organe habilité à émettre des sentences administratives selon la teneur du canon 1445 § 2 et de l'article 123 §§ 1 et 3 de la constitution apostolique *Pastor bonus*⁵⁶.

2.2 — La sentence pénale

La sentence pénale répond aux objets fondamentaux du procès pénal canonique en tant que discipline spécifique⁵⁷. En effet, l'objet de ce procès, en lien avec l'esprit du Concile Vatican II, consiste essentiellement à l'infliction et la déclaration des peines canoniques selon les termes du canon 1401, n. 2⁵⁸. "L'infliction" se dit en raison des peines *ferendæ sententiæ* qui ne parviennent à leur destinataire que par voie sententiaire ou par décret de l'ordinaire. Quant au terme "déclaration", il est employé par rapport aux peines *latæ sententiæ*, pour lesquelles la sanction est induite *ipso iure* au

⁵⁶ Cf. Z. GROCHOLEWSKI, « Supremo Tribunale della Segnatura Apostolica e sentenza canonica », dans *Ap*, 59 (1986), 193-194.

⁵⁷ Cf. IDEM, « Il processo penale giudiziario nel "Codex Iuris Canonici" del 1983 », dans *Ap*, 73 (2000), 367-405.

⁵⁸ À la liste des sanctions pénales établie aux cc. 1312 § 1 et 1336 § 1, R. Szewczyk ajoute la privation de l'office ecclésiastique selon les termes du c. 196 qui précise ceci : « § 1. La privation d'un office, en tant que punition d'un délit, ne peut être infligée que selon le droit. § 2. La privation produit effet selon les dispositions des canons du droit pénal ». R. SZEWCZYK, *La natura e gli effetti della privazione dell'ufficio ecclesiastico nei Codici di Diritto Canonico del 1917 e del 1983*, Rome, Pontificia Università Lateranense, 1999, 45-56.

moment de la commission du délit⁵⁹. La compétence du juge ne se limite qu'à la déclaration de la peine. Cet objet du procès pénal canonique se fonde sur « le droit inné et propre de l'Église à contraindre par des sanctions pénales les fidèles délinquants » (c. 1311).

Les causes conclues au moyen des sentences pénales portent sur les délits déjà préétablis, comme il en résulte des codes pénaux des ordonnancements juridiques sociaux. Aussi est-il admis des canons 1364 à 1398 du livre VI du *CIC*, en sa nature de “code pénal canonique”, un catalogue de sanctions applicables à des causes délictueuses. En outre, avec le m.p. *Sacramentorum sanctitatis tutela*⁶⁰, nous notons l'existence de dispositions particulières réservées aux *delicta graviora*. Enfin, une analyse de la jurisprudence en matière pénale laisse entrevoir des causes d'autres natures telles que : l'injure, la diffamation et les délits *contra bonos mores*⁶¹.

Le contenu des sentences pénales porte sur la condamnation ou sur l'absolution de l'accusé (c. 1726). Dans le premier cas de figure, il s'agit nominativement de sentence condamnatoire et dans le second l'on parle de sentence absolutoire. Entre ces deux types, il existe une figure de sentence intermédiaire qualifiée de démissoire, qui résulte du manque de certitude morale chez les juges dans l'analyse des preuves et des actes judiciaires présentés au cours du procès et permettant d'aboutir à l'une ou à l'autre des positions précédentes. Le contenu des sentences pénales définit également les modalités de l'action en réparation des dommages (cc. 1729-1731). Sur ses lignes structurelles, le législateur n'a émis aucune disposition particulière concernant la sentence pénale. Elles ne s'écartent donc pas de celles qui régissent les sentences canoniques concluant le procès contentieux en général (c. 1611). Les organes judiciaires habilités à émettre les sentences pénales au for canonique sont suivant la prescription du droit, la nature de la cause,

⁵⁹ Cf. Z. SUCHECKI, « Il processo penale giudiziario », dans IDEM (dir.), *Il processo penale canonico*, Rome, Lateran University Press, 2003, 252.

⁶⁰ JEAN-PAUL II, Lettre apostolique m.p. *Sacramentorum sanctitatis tutela*, 30 avril 2001, dans AAS, 93 (2001), 737-739; CONGREGATION POUR LA DOCTRINE DE LA FOI, Rescriptum ex audientia *Normae de gravioribus delictis*, 21 mai 2010, dans AAS, 102 (2010), 419-431.

⁶¹ Cf. V. PALESTRO, « Le sentenze penali della Rota Romana », dans Z. SUCHECKI (dir.), *Il processo penale canonico*, 325-364. La jurisprudence considère la diffamation comme un délit, si elle est associée à des questions pécuniaires, aux troubles de l'ordre social et si elle porte atteinte à la bonne réputation d'une personne « *quia aestimatio bonum est opinione hominum positum, ideo eam sibi adseruit iure suo et is qui nihil deliquit, etiam cuius delictum latet, quasi rem a se pacifice possessam* ». Avec la diffamation en fait, on ne lèse pas le principe de charité, mais plutôt la justice. *Ibidem*, 346. Suivant une c. PRIOR, (« Decisio 24 aprilis 1913 [Privationis] », dans RRT *Dec*, vol. 5 [1919], 270-282), l'ébriété est retenue comme une cause pénale.

la juridiction qui s'en charge et les instances de recours : le Siège Apostolique (cc. 1364-1398), certains dicastères de la Curie romaine, le tribunal de la Rote romaine, les tribunaux inférieurs dans les cas qui leur sont dévolus de droit ou par délégation.

2.3 — La sentence arbitrale

L'arbitrage est une réalité brièvement abordée aux canons 1446 § 3 et 1713 à 1716 de l'actuel code⁶². Au titre III du « *De processibus* », il apparaît avec les notions conjointes que sont la transaction et le compromis, en tant que des *modis evitandi iudicia*. Il n'a pas de parallèle dans le *CCEO*. À l'inverse, il est mentionné dans le *CIC/17* au canon 1929⁶³. L'arbitrage se dit du règlement par voie pacifique d'un litige de droit privé par l'intervention de tiers appelés arbitres. Il n'engage aucun rapport processuel de type judiciaire. L'accord entre les parties qui les fait se soumettre à un arbitre s'appelle un compromis.

Sur l'opportunité de la sentence arbitrale, R. Naz se montre sceptique en précisant qu'en rigueur de principe, le vocable “sentence” adjoint à “arbitrage” serait impropre. C'est plutôt de décision qu'il s'agit, d'autant plus que : « L'arbitre n'est jamais appelé juge dans le Droit Canonique. Bien qu'il fasse office du juge, condamne et absolve comme lui, il n'agit pas par juridiction : son action, provenant de la convention des parties est purement ministérielle. (...) En outre, bien que l'arbitrage se fasse suivant les lois judiciaires, la décision de l'arbitre ne produit pas la force de chose jugée : or, chose jugée et sentence sont inséparables »⁶⁴. Toutefois le même auteur consent au caractère approprié du terme, lorsque la présence de l'arbitre est nécessairement prescrite de droit. Néanmoins, dans le code actuel, le terme sentence arbitrale est perceptible surtout au canon 1716 § 1. Et c'est suivant cette terminologie qu'il convient de désigner la décision qui résulte du compromis visant à résoudre pacifiquement un litige ecclésiastique.

⁶² La raison est qu'à l'origine, l'arbitrage est une notion de droit civil qui s'est vue intégrée au droit canonique avec les mêmes considérations tant dans son concept que dans son rôle. C'était sans doute le mode le plus ancien de rendre la justice. On observe ses ascendances grecques et romaines déjà à des temps très reculés. R. NAZ, « Arbitrage », dans *DDC*, vol. 1, 862-865; cf. A. JULLIEN, « Evolutio historica compromissi in arbitros in Iure Canonico », dans *Ap*, 10 (1937), 187-232.

⁶³ Le *CIC/17* distinguait entre l'*arbitrator*, qui tranche en droit, et l'*arbitrator*, qui tranche souverainement, c'est-à-dire sans être strictement tenu de suivre les règles juridiques. Cette distinction a disparu avec l'avènement du Code de 1983.

⁶⁴ R. NAZ, « Arbitrage », dans *DDC*, vol. 1, 880.

Le canon 1716 prouve l'existence et l'efficacité de la sentence arbitrale au for canonique. Les causes qu'elle traite sont celles pour lesquelles il n'y a pas dans le droit, défense expresse de résolution par compromis et décision arbitrale⁶⁵. Pourtant cette généralité connaît des exceptions. Ainsi en est-il des causes graves ou intéressant le bien public, et l'état des personnes, ou des causes qui portent avec elles, en raison de leur nature, l'occasion d'un préjudice considérable pour une partie⁶⁶. Dans sa nature caractéristique, la sentence arbitrale pourrait être qualifiée d'un accord, surtout en sa qualité de moyen pacifique pour régler un contentieux.

2.4 — La sentence rescisoire

L'approche conceptuelle du terme *rescisio* s'insère dans celle de la *restitutio in integrum*. En effet, « La *restitutio in integrum* est une procédure judiciaire tendant à remettre dans sa situation originelle une partie qui a subi un préjudice résultant d'un acte ou d'un moyen valable d'après les principes du droit civil, mais estimé injuste. Elle comporte comme préliminaire une décision par laquelle le magistrat rescinde, c'est-à-dire anéantit la cause du préjudice »⁶⁷. Ainsi, la rescision est-elle un dispositif de prévenance qui concède à l'autorité légitime la prérogative de faire disparaître des actes juridiques valides bien que réunissant tous les éléments essentiels requis, mais entachés de certains vices qui les rendent susceptibles d'être annulés⁶⁸. La sentence rescisoire est donc celle qui porte un acte de rescision; une sentence d'annulation d'un acte juridique lésionnaire. Dans le *CIC*, le concept est soutenu par les canons 125 et 126 (*CIC*/17 cc. 1684-1685; *CCEO* cc. 932-933).

La spécificité de la sentence rescisoire provient du fait que jusqu'à son annulation, l'acte en cause est juridiquement efficace, cette compétence lui étant enlevée par la décision d'annulation elle-même qui ne produit d'effet qu'*ex nunc*. Il ne s'agit pas d'une décision purement déclarative, mais bien d'une décision constitutive, prononcée par le juge à l'appréciation de la

⁶⁵ Cf. R. RODRÍGUEZ-OCAÑA, « Comentario del can. 1716 », dans Á. MARZOA et al. (dirs.), *Comentario exegético al Código de Derecho Canónico*, vol. 4/2, 2050-2055.

⁶⁶ Cf. *Decretalium GREGORII IX*, Lib. I, Tit. XLI, cap. 9.

⁶⁷ R. NAZ, « Rescision », dans *DDC*, vol. 7, 602-607.

⁶⁸ L'acte rescindable est un « *actus in se validus ideoque efficacia iuridica praeditus, utpote nullo carens elemento essentiali ad negotium iuridicum requisito, sed vitio quodam infectus, vi cuius infirmus est seu ex parte auctoritatis legitimae annullationi obnoxius* ». G. MICHELS, *Principia generalia de personis in Ecclesia*, 2^{ème} éd., Paris, Desclée de Brouwer, 1955, 602.

demande du pétitionnaire⁶⁹. C'est pourquoi, à la différence de la déclaration de nullité qui ne fait que constater une invalidité *ipso iure*, la rescision invalide un acte qui n'est pas nul en soi. Le juge ne fait simplement qu'apprécier la gravité de la cause invoquée pour prononcer ou non la rescision. En outre, la sentence rescisoire en tant que procédé d'annulation d'un acte juridique est admise aussi bien dans le domaine administratif (c. 149), en matière d'élection (c. 166) que dans le cadre des actes de procédure (c. 1451). Par contre, elle est strictement proscrite dans la sphère matrimoniale, en raison de l'indissolubilité du mariage *ratum et consummatum* entre deux baptisés⁷⁰. Les causes qui la motivent sont : la crainte, définie comme « *instantis vel futuri periculi causa mentis trepidatio* »⁷¹; le dol, défini comme « *calliditas, fallacia, machinatio ad circumvenendum, fallendum, decipiendum alterum* »⁷²; l'ignorance ou l'erreur. Le prononcé de la sentence rescisoire est l'œuvre de la première section du Tribunal Suprême de la Signature Apostolique conformément aux dispositions du canon 1445 § 1, 1^o⁷³.

2.5 — La sentence de nullité matrimoniale

La sentence qui déclare la nullité du mariage prend forme dans les procédures judiciaires établies à cet effet, sous le triple aspect de contentieux ordinaire (cc. 1671-1685), de procès documentaire (cc. 1686-1691) et du procès en forme brève (*processus brevior*) récemment introduit par le Pape François. En effet, l'objet du procès matrimonial canonique est éminemment pastoral pour autant qu'il soit mû par une seule finalité : la recherche de la vérité⁷⁴. Une vérité qui est protection d'un bien d'institution divine :

⁶⁹ A. JACOBS, *Le droit de la défense dans les procès en nullité de mariage*, Paris, Cerf, 1998, 21.

⁷⁰ « Les vices du consentement donnant habituellement lieu à rescision de l'acte n'en sont néanmoins pas ignorés, mais en vertu de dispositions particulières, ils constituent de véritables causes de nullité, faisant obstacle à la validité du mariage *ab initio* ». C'est la raison pour laquelle on ne peut engager un acte rescisoire contre un mariage entaché de vice, il fait plutôt l'objet d'un procès canonique. *Ibidem*, 22.

⁷¹ R. NAZ, « Rescision », dans *DDC*, vol. 7, 605.

⁷² *Ibidem*, 606.

⁷³ Cf. Z. GROCHOLEWSKI, « Supremo Tribunale della Segnatura Apostolica e sentenza canonica », 192-193.

⁷⁴ Avec BEYER, il est « Procédure de vérité », visant à indiquer sa perspective résolument tournée vers la recherche de la vérité du procès de déclaration de nullité matrimoniale, qui d'ailleurs fonde sa différence de caractère d'avec les autres types de procès canoniques. J. BEYER, « Le nouveau Code de Droit Canonique, esprit et structures », dans *Nouvelle Revue Théologique*, 106 (1984), 573; L. SABBARESE, « Il vescovo giudice nel processo più breve : Ragioni e questioni », in P. PALUMBO (dir.), *Le sfide delle famiglie tra diritto e*

l'indissolubilité du mariage. En ce sens, bien que reclus par le législateur dans le moule strict du procès contentieux en général, en rigueur de principe la déclaration de nullité n'en est pas réellement un. Il s'agit plutôt d'un procès qui apprécie et évalue la qualité d'un mariage aussi bien dans sa constitution *ab intrinseco* qu'*ab extrinseco*. Aussi s'avère-t-il utile de sortir de toute ambiguïté, en l'extrayant du contexte des procès contentieux pour le désigner d'un nom qui exprime son caractère atypique. Pourquoi ne parlerait-on pas de procès de vérification de la validité du mariage canonique⁷⁵?

À la vérité, sur l'essence du procès contentieux, par définition, il « vise à trancher un conflit de droit. Il met en opposition deux parties ennemies, engagées dans une lutte qui donnera un vainqueur et un vaincu »⁷⁶. La sentence qui en découle détermine soit un acquittement soit la sanction d'un délit. Or, il paraît obvie que cette perspective s'oppose diamétralement à la finalité des procédures de nullité matrimoniale, conçues pour « des causes sacramentelles dont le but n'est pas avant tout de sauvegarder le droit des époux présumés, puisqu'un mariage pourrait théoriquement être déclaré nul contre leur volonté (c. 1674, 2°), mais bien de sauvegarder et de protéger la réalité sacramentelle du mariage qui est une source de grâce divine et un moyen de sanctification pour les époux et pour l'Église »⁷⁷.

Dans le concept de sentence déclaratoire de la nullité du mariage, les termes “déclaration” et “nullité” méritent une attention particulière, se posant respectivement l'un, comme un mode de présentation et l'autre, comme la finalité spécifique de ladite sentence. La “déclaration” consiste en l'affirmation de l'existence d'une situation juridique. Ainsi implique-t-il autant les juges à une évaluation déclarative qu'au prononcé d'une règle de droit constitutive de type condamatoire⁷⁸. Sur ce fait, un acte déclaratoire

misericordia, Confronti ad un anno dalla riforma del processo di nullità matrimoniale nello spirito dell'Amoris laetitia, Turin, G. Giappichelli Editore, 2017, 93-111.

⁷⁵ Pendant la révision du *CIC/17*, certains organes de consultation ont souligné l'inadéquation de la voie judiciaire s'agissant des questions matrimoniales dans lesquelles les parties ne sont pas à considérer comme des adversaires, mais plutôt comme opposées entre elles dans un procès contentieux. La remarque a été rejetée par la commission (PONTIFICIA COMMISSIO AD CODICEM IURIS CANONICI AUTHENTICE INTERPRETANDUM, « Acta commissionis », dans *Comm*, 10 [1978], 211 et *Comm*, 15 [1984], 77). Il serait préférable de présenter le procès de nullité matrimoniale comme un procès de vérification de la validité du lien. L'intérêt de cette orientation terminologique comporte l'avantage de ne pas fixer les esprits sur l'intention maladroite selon laquelle, l'unique issue de ce procès ne serait que la déclaration de la nullité du mariage.

⁷⁶ G. LESAGE, « Pour une rénovation de la procédure matrimoniale », dans *StC*, 7 (1973), 256.

⁷⁷ Cf. A. JACOBS, *Le droit de la défense dans les procès en nullité de mariage*, 33-34.

⁷⁸ Cf. E. CORECCO, « La sentenza nell'ordinamento canonico », dans UNIVERSITÀ DEGLI STUDI DI FERRARA (dirs.), *La sentenza in Europa*, 276-279; R. L. BURKE, « Le procès canonique

n'établit aucune nouveauté. Il met plutôt en évidence et est efficient. À l'instar de la demande judiciaire qui établit de manière standard la question centrale à laquelle la sentence répond, il présente la véracité originelle d'une situation matrimoniale qui parfois n'est pas toujours visible comme dans le cas des mariages putatifs (c. 1061 § 3). Quant au terme "nullité", se distinguant d'annulation, il s'oppose au divorce et à la dissolution du lien⁷⁹. Il précise l'inexistence de l'acte matrimonial. Par essence, un acte est juridiquement inexistant lorsqu'il est entaché d'un vice tellement radical qu'il est rejeté du droit. Dès lors, il prend les allures et les formes « d'un acte apparent, d'une tentative d'acte », sans aucune efficacité juridique⁸⁰. De ce fait, le terme "nullité" nous introduit dans la finalité spécifique de la sentence.

La sentence de nullité matrimoniale, dans la nomenclature des diverses sentences canoniques, est assez singulière par son caractère entièrement tourné vers la certification de la vérité. Elle se contente de lever complètement le voile sur la nature d'un fait et d'en tirer les conséquences juridiques qui s'ensuivent pour le statut des personnes. Elle établit dans quelle mesure le mariage conclu par les époux a pu développer sa vitalité et aboutir à une déclaration de validité ou de nullité. Bien qu'ayant force de loi entre les parties en la cause, en aucun cas elle ne définit des sanctions. Au plus, elle fixe des mesures pastorales préventives et curatives. Après cette approche conceptuelle de la sentence canonique dans sa définition, sa spécificité et sa typologie, il convient d'aller à la découverte de son importance.

en nullité de mariage : une recherche de la vérité », dans R. DODARO (dir.), *Demeurer dans la vérité du Christ, Mariage et communion dans l'Église catholique*, Paris, Artège, 2014, 215.

⁷⁹ Le divorce suppose un mariage valide, réunissant toutes les conditions requises pour l'établissement d'une société conjugale, auquel le juge vient mettre fin par une décision. « Le juge agit à la demande d'une des parties et prononce le divorce au titre de sanction d'un comportement du conjoint contraire aux obligations du mariage ou éventuellement, selon les législations, pour entériner la décision prise de commun accord par les deux époux de mettre un terme au mariage qu'ils avaient réellement et validement contracté ». J.-C. GROS-LIERE, « Divorce (procédure) », dans J. VINCENT et al. (dirs.), *Guide juridique DALLOZ*, vol. 2, Paris, Jurisprudence générale Dalloz, 1986, col. 216-1 à 216-17.

⁸⁰ Cf. J. POUSSON-PETIT, *Le démariage en droit comparé, Étude comparative des causes d'inexistence, de nullité du mariage, de divorce et de séparation de corps dans les systèmes européens*, Bruxelles, Établissements Émile Bruylant, 1981, 57. Au-delà, l'« *actus iuridice inexistens, eos scilicet in quibus deficit elementum aut praesuppositum quod ex ipsa rei natura, sive vi iuris divini naturalis aut positivi, sive vi iuris ecclesiastici (si agatur de actibus, quorum forma intrinseca, elementa essentialia ipsos in suo esse determinata natura constituentia determinantur legge canonica), requiritur tamquam elementum ipsius actus essentialiter constitutum aut tamquam praesuppositum ad physicam vel iuridicam eiusdem existentiam absolute necessarium* ». G. MICHIELS, *Principia generalia de personis in Ecclesia*, 599-600.

3 — *L'importance de la sentence canonique*

G. Cornu à l'occasion d'une réflexion sur le thème de la sentence dans le système juridique en France, affirmait que : « parler de sentence, c'est s'engager à discerner dans la décision de justice, ce qu'elle apporte au droit et à la société que gouverne ce droit »⁸¹. Cette conviction traduit avec persuasion la motivation poussant à découvrir l'intérêt ou les apports spécifiques de cette dernière dans l'ordonnancement canonique. En effet, les sentences d'un tribunal ecclésiastique, en engageant non seulement son honorabilité, mais aussi celle de l'Église au nom de laquelle il a agi, ont un impact sur le *status personarum* au sein du peuple de Dieu et dans l'organisation de l'exercice du pouvoir judiciaire assumé par le système juridique canonique. Ce système est l'ensemble des principes régissant les relations entre les sujets du droit canonique (les *christifideles*). Ces relations, à l'inverse de la société civile, ne découlent pas d'un pacte social, mais procèdent exactement de la structure sacramentelle et hiérarchique que le Christ a voulu établir pour son Église⁸².

Dans les rapports entre les sujets de droit en direction desquels elle est prononcée, la sentence canonique est émise en vue du salut des âmes. Elle constitue une voie d'expression privilégiée du législateur dans la définition d'une cause concrète, en œuvrant au rétablissement des droits subjectifs lésés, dans la poursuite du bien commun, de la justice et de l'idéal de perfection prêchée par le Christ. Dans la *praxis iudicialis canonica*, la sentence est une source créatrice de jurisprudence, à l'image de ce qui prévaut dans la *common law*⁸³, en se posant comme un instrument à disposition pour combler les *lacunæ* ou les brèches du droit.

3.1 — Entre les sujets à l'ordonnancement canonique

Au sein de l'ordonnancement canonique, la sentence a d'abord une valeur sotériologique et pastorale. Elle est ensuite un tremplin par lequel le législateur, à travers le juge, rejoint le concret des situations humaines par le procédé de la mise en acte des lois. Elle est enfin une expression tangible du rétablissement de la justice entre justiciables, tout en veillant foncièrement à la protection du bien public.

⁸¹ Cf. G. CORNU, « La sentence en France », 160.

⁸² Cf. J. I. ARRIETA, « Stabilité et dynamisme du système juridique canonique », dans *StC*, 45 (2011), 7.

⁸³ Cf. L. BOMBIN, « Decidere per “criteri” : il giudizio in *common law* », dans P. GHERRI (dir.), *Decidere e giudicare nella Chiesa*, 155-178.

3.1.1 — Une portée sotériologique

La sentence en tant qu'acte conclusif du procès judiciaire en constitue le condensé. Sa portée et sa finalité sont révélatrices de l'esprit dans lequel s'exerce le pouvoir judiciaire dans l'Église qui tout en poursuivant raisonnablement une justice, mue par la recherche de la vérité, a plutôt une orientation ontologiquement pastorale et caritative⁸⁴. En effet, la nature de la justice vécue dans l'Église n'est pas coercitive au sens pénal du terme⁸⁵. Elle est en revanche réparatrice, faisant appel à la miséricorde et au rachat de la brebis égarée⁸⁶. Cette dernière perspective éminemment revalorisée par le Concile Vatican II⁸⁷ fera dire au pape Paul VI que le droit de l'Église est différent du droit de l'État. Il est en fait un droit de grâce car imprégné d'un caractère sotériologique et pastoral⁸⁸.

La sentence émise *inter partes* est préalablement ordonnée à cette mission originelle, qui en constitue son principal enjeu tel qu'en témoigne l'aphorisme *salus animarum suprema lex esse debet* (c. 1752). En fait, selon la déclaration *Dignitatis humanæ* sur la liberté religieuse, la *salus animarum* indique « l'ensemble des dispositions permettant aux Hommes d'atteindre pleinement leur épanouissement »⁸⁹. La poursuite de cet objectif est certes individuelle mais, il s'étend à la communion ecclésiale à travers la dynamique des sacrements intégrant le corps même de l'Église, signe de l'union de Dieu avec les hommes. De ce fait, la sentence canonique aussi bien dans l'ordre de la grâce que de la nature a une dimension pleinement pastorale⁹⁰.

Ce caractère sotériologique sert en toute impartialité et dans un esprit de charité chrétienne à rectifier les erreurs en permettant l'amendement ou la

⁸⁴ Cf. M. POMPEDDA, « Il processo canonico di nullità di matrimonio : Legalismo o legge di carità? », dans *IE*, 1 (1989), 423-447.

⁸⁵ Cf. S. BOKWANGA MOLAKU, *La signification du pouvoir coercitif dans l'Église*, Rome, Pontificia Universitas Urbaniana, 1991. Dans le dernier chapitre de cette thèse, l'auteur cherche à savoir en quoi consiste le pouvoir coercitif de l'Église et comment peut-on le comprendre aujourd'hui. Il traite de la pastoralité dans le droit pénal, comme symbiose entre la justice et la charité.

⁸⁶ Cf. P. MONETA, « La “salus animarum” nel dibattito della scienza canonistica », dans *IE*, 12 (2000), 307-326. En outre, en sa qualité de fin ultime de l'Église et de l'ordonnement canonique, se référer à J. HERRANZ, « La “salus animarum” principio dell'ordinamento canonico », dans *IE*, 12 (2000), 291-306.

⁸⁷ Cf. *Lumen gentium*, n. 1.

⁸⁸ Cf. PAUL VI, Lis qui in Gregoriana studiorum Universitate “*Cursui renovationis canonicae pro iudicibus aliisque tribunalium administris*” interfuerunt, 13 décembre 1972, dans *AAS*, 64 (1972), 781.

⁸⁹ Cf. *Dignitatis humanæ*; J. I. ARRIETA, « La “salus animarum” quale guida applicativa del diritto da parte dei pastori », dans *IE*, 12 (2000), 343.

⁹⁰ Cf. E. CORECCO, « La sentenza nell'ordinamento canonico », 274-275.

prise de conscience des fautifs et à orienter vers le droit chemin⁹¹. À ce sujet, le Cardinal Jullien, cernant la question du côté des acteurs des tribunaux, intervient sur la responsabilité des juges ecclésiastiques dans la délibération judiciaire et souligne :

Ce n'est pas une chose de peu d'importance, ni une faute légère que de causer à une âme la perte de biens inestimables(...). Voilà pourquoi celui qui se trompe par témérité quand il devait donner un jugement éclairé, (...) subira certainement un châtiment en rapport avec le préjudice qu'il a causé. Il faut s'occuper des choses de Dieu avec beaucoup de circonspection et les yeux grands ouverts, surtout quand (...) sont en jeu des biens et des maux presque infinis⁹².

De fait, affirme-t-il plus loin :

Quelle responsabilité pour le juge ecclésiastique, si, par sa faute il déclare libres deux conjoints unis validement devant Dieu : ou si, contre l'ordre voulu par Dieu et par l'Église, il enchaîne l'une à l'autre deux personnes qui, devant Dieu, ne sont pas unies entre elles et ont le droit devant l'Église et la société de reprendre leur liberté ! La faute de ce juge n'est-elle pas plus grande que celle d'un juge qui condamnerait injustement à la prison ou à une amende ?⁹³

D'où l'immense responsabilité du juge en précisant la décision définitive. Le code prescrit qu'elle émane d'une profonde conviction *ex sua conscientia*. Dans le droit pénal également, la sentence visant à déclarer ou à infliger une peine intervient en vue de la cure des âmes en proie aux difficultés de tous ordres : physique, psychique et socio-psychologique. En somme la sentence, en sa qualité de décision de justice est un acte qui, indéniablement participe de la communion ecclésiale et œuvre à l'accomplissement de la *salus animarum*, sommet de tout agir dans l'économie chrétienne.

3.1.2 — Une mise en acte de la loi

La sentence en tant que décision délibérative est la réponse que la loi donne de la requête singulière d'un sujet de droit en l'engageant à son

⁹¹ Cf. G. MONTINI, « É necessario assicurare il carattere pastorale dei tribunali ecclesiastici », dans *Periodica*, 98 (2009), 321-364. Pour l'auteur, le droit ne doit pas être réduit à un rigorisme absolu, tandis que la pastorale fait appel à l'exercice d'une largesse illimitée. Les deux disciplines sont complémentaires et poursuivent une même fin : la recherche de la vérité au service de l'homme.

⁹² A. JULLIEN, *Juges et avocats des tribunaux de l'Église*, Rome, Officium Libri Catholici, 1970, 49.

⁹³ *Ibidem*, 55.

application⁹⁴. Cette mise en acte de la loi n'est pas une "adaptation" du droit à un cas spécifique. Auquel cas, la présence des juges et des tribunaux serait sans effet et il y aurait d'énormes difficultés à définir judiciairement une cause. La sentence n'énonce pas la loi à la mesure de convenances. À travers elle, le juge ne fait pas non plus œuvre d'interprétation authentique de la loi⁹⁵. C'est une charge strictement dévolue au législateur que ce dernier ne saurait usurper au cœur d'un ordonnancement dans lequel la spécificité des compétences est de mise⁹⁶.

La sentence émise *inter partes* dit le droit exactement comme la loi dont elle n'est que la déclaration. Elle est le résultat de la fidèle application de la loi à la situation concrète et particulière des parties en cause. À vrai dire, la loi nous réfère au Législateur en indiquant un des modes d'expression de sa volonté en vue du bien commun de ses sujets. Si la sentence est application de la loi au cas d'espèce, c'est dire qu'au travers de celle-ci, le législateur par le juge rejoint le cas concret pour le définir. Cet acte devient alors un

⁹⁴ La nature de cette obligation provient de la légitimité du juge, en sa qualité de personne publique. Cf. F. M. CAPPELLO, *Summa Iuris Canonici*, Rome, Pontificia Universitas Gregoriana, 1936, vol. 3, 86, n. 91; X. WERNZ et P. VIDAL, *Ius canonicum, De processibus*, 2^{ème} éd., vol. 4, Rome, Pontificia Universitas Gregoriana, 1949, 78, n. 77.

⁹⁵ L'interprétation authentique provient uniquement du cadre législatif. Néanmoins, le législateur reconnaît aussi que la loi, en plus d'être interprétée *modus legis*, est interprétée *per modum sententiæ iudicialis*, qui cependant *vim legis non habet et ligat tantum personas pro quibus data est*. Dans la *disputatio* doctrinale qui a surgi autour de la nature de l'interprétation advenant *per modum sententiæ iudicialis*, certains canonistes affirment sa nature authentique à l'endroit des sujets engagés dans la cause (J. HERRANZ, « L'interpretazione autentica : il Pontificio Consiglio per l'Interpretazione dei Testi Legislativi », dans P. A. BONNET et C. GULLO [dirs.], *Il diritto della Chiesa, interpretazione e prassi*, Studi Giuridici 41, Cité du Vatican, LEV, 1996, 73; JEAN-PAUL II, Allocutio ad prelatos auditores Sacræ Romanæ Rotæ coram admissos, 26 janvier 1984, dans AAS, 76 [1984], 647, n. 6). D'autres préfèrent ne pas se plonger dans cette analogie terminologique pour désigner l'interprétation *per modum sententiæ*, ils parlent d'interprétation jurisprudentielle (M. POMPEDDA, « La giurisprudenza rotale tra *ius conditum* e *ius condendum* », dans E. CAPPELLINI [dir.], *Problemi e prospettive di diritto canonico*, Brescia, Queriniana, 1977, 293), ou encore d'interprétation authentique particulière (O. ROBLEDA, « De interpretatione iuridica in iure romano et canonico [CIC] quæstiones », dans *Periodica*, 48 [1959], 601). La discussion reste toujours ouverte.

⁹⁶ « *Munus iudicis non est munus legislatoris. Iudex non est legislator, sed legis interpret tantum, et quidem pro singula controversia tantum de qua in iudicio pronuntiat* ». Z. VARALTA, « De iurisprudentiæ conceptu », dans *Periodica*, 62 (1973), 46. « Il y a une sorte de dialogue entre le juge et le législateur; un dialogue où le législateur parle beaucoup et où le juge risque de temps à temps un mot (...). La règle d'or demeure que les tribunaux ne doivent pas abuser de leur pouvoir d'interprétation. Car le pouvoir judiciaire n'est pas le rival, ni moins encore le tuteur du pouvoir législatif ». M. SOMERHAUSEN, « La motivation et la mission normative du juge », dans C. PERELMAN et P. FORIERS (dirs.), *La motivation des décisions de justice*, 35.

tremplin relayant la présence de ce dernier dans la vie des sujets sous son obédience. Toutefois, ce cheminement requiert un processus intellectuel que seule la méthode interprétative est censée offrir. L'interprétation de la loi, dans le processus de son application est pour le juge le point de contact entre la généralité de la norme et la singularité du cas⁹⁷. Elle est le catalyseur qui, en permettant la fusion entre ces deux entités, fait naître sa décision. Elle meut suivant la variation des cas, mais tout en demeurant strictement dans les sillons tracés par la loi. Ce faisant, la sentence en tant qu'instrument matériel de cette décision, contribue au maintien d'une atmosphère légale dynamique. De fait l'Église, d'origine divine est une société dans laquelle le droit sert à réguler les rapports entre les fidèles⁹⁸.

En clair, retranscrivant le résultat du dynamisme du cas (le *ius litigatoris*), éprouvé au regard de la loi (le *ius constitutionis*), la sentence est un mode privilégié de concrétisation des normes législatives *inter partes*. En conséquence, elle n'est rien d'autre que la *vox legislatoris* exprimée par le juge.

3.1.3 — *Le rétablissement des droits et la protection du bien public*

La sentence *inter partes* a pour intérêt de présider à la découverte de la vérité par le biais de la justice⁹⁹. Elle aboutit au rétablissement des droits du justiciable, en induisant à la protection du bien public lésé (c. 1689). Il s'agit d'un processus dont le trait caractéristique se trouve dans l'indication du mode selon lequel les dommages ou les torts causés devront être réparés (cc. 1499 et 1649 § 1, 4°). Cette étape, étant l'une des expressions matérielles de la volonté du juge de rétablir la justice sociale, l'harmonie et l'ordre communautaire rompus par l'objet cause du procès, établit : « Les obligations imposées à la partie perdante du procès, en conséquence de la solution de principe déjà donnée. Ces obligations peuvent être positives : faire, donner, restituer; ou négatives : abstentions. S'il y a lieu la sentence fixe l'attribution des fruits civils ou naturels produits par l'objet en litige et ordonnera la réparation des dommages »¹⁰⁰.

⁹⁷ Cf. A. STANKIEWICZ, « L'interpretazione della legge con riferimento alle funzioni della potestà ecclesiastica », dans *Ap*, 52 (1979), 416; F. COCCOPALMERIO, « La Rota Romana e la sua funzione nell'interpretazione della legge canonica », dans *QSR*, 18 (2008), 115-130.

⁹⁸ Cf. c. BURKE, « Decr. 17 iulii 1997 (Sancti salvatoris in America) », dans *RRT Decr*, vol. 15 (1997), 141, n. 3.

⁹⁹ Cf. PIUS XII, Allocutio ad prælatos auditores ceterosque officiales et administratos Tribunalis S. Romanæ Rotæ necnon eiusdem Tribunalis Advocatos et Procuratos, 1 octobris 1942, dans *AAS*, 34 (1942), 342, n. 4.

¹⁰⁰ B. PELLINGRA, « La sentenza nei suoi aspetti, della metodologia e della tecnica », dans UNIVERSITÀ DEGLI STUDI DI FERRARA (dir.), *Sentenza in Europa*, 418.

Le rétablissement de la justice que promeuvent les sentences canoniques est une véritable expression de la charité chrétienne que l'Église met en évidence dans son ministère public, qu'il s'agisse de matières pénales ou des causes attenantes à la validité du mariage¹⁰¹. À la vérité, le principe de la charité dans l'Église ne se réalise pas sans la justice. Le droit est une diaconie, un service à la charité. Le tort dans sa nature a des incidences notables sur l'harmonie sociale. Il crée une défection aussi bien dans l'ordre social communautaire qu'individuel. La perspective de la charité chrétienne que prône la dimension communautaire de l'Église impose que cette dernière, ne rejetant pas le coupable à l'issu d'un procès judiciaire, exige tout de même la réparation des dommages ou des distorsions tant dans l'ordre social (le bien public), que dans le dynamisme émergeant des rapports juridiques (la mise en œuvre des droits subjectifs), que son tort aurait causés (LG 9).

La logique du rétablissement de la justice engage à la protection des droits ou des mécanismes de défense que les lois offrent aux parties en cause contre les éventuelles violations des droits subjectifs. Ce principe est précisé au canon 1400. « Il présente le système ecclésiastique dit de double juridiction : ordinaire, pour défendre ses droits contre les autres fidèles; administrative, pour présenter des recours contre la violation de droits par l'autorité exerçant le pouvoir exécutif »¹⁰². La sentence, en intimant l'obligation de réparer le tort causé, protège implicitement les victimes et par le fait même affirme l'égalité fondamentale de tous les fidèles.

3.2 — Dans la *praxis* judiciaire

L'importance de la sentence se révèle dans sa contribution à la formation de la jurisprudence des tribunaux ecclésiastiques et dans sa capacité à pallier les insuffisances ou lacunes de la loi.

3.2.1 — La formation de la jurisprudence

Le canon 19 établit un présupposé d'interprétation stricte : « *Si certa de re desit expressum legis sive universalis sive particularis præscriptum aut*

¹⁰¹ « La justice et la charité, pour être authentiques, doivent s'associer et s'intégrer indissolublement; s'il est vrai que la miséricorde sans la justice est mère du désordre, il est aussi vrai que la justice sans la miséricorde est cruauté. Nous pouvons donc affirmer que la justice sans l'amour est vide, la compassion sans une norme droite est aveugle ». M. POMPEDDA, « Il processo canonico di nullità di matrimonio : Legalismo o legge di carità? », 428.

¹⁰² D. LE TOURNEAU, « Quelle protection pour les droits et les devoirs fondamentaux des fidèles dans l'Église? », dans *StC*, 28 (1994), 59-83.

consuetudo, causa, nisi sit poenalis, dirimenda est attentis legibus latis in similibus, generalibus iuris principiis cum æquitate canonica servatis, iurisprudentia et praxi curiæ Romanæ, communi constantique doctorum sententia ». D'après la teneur de ce canon, la jurisprudence intègre les sources créatrices de droit dans les matières où manque une disposition expresse de la loi ou de la coutume. Mais, il s'agit de cas extrêmement limités et exceptionnels. Par conséquent, cette norme ne saurait être sujette à des ouvertures extensives. En portant l'attention sur l'élément fondateur de la jurisprudence, à l'origine nous avons la décision des juges, rendue par la sentence. Aussi l'un des intérêts perçu à travers cet acte est sa contribution notable à la formation de la jurisprudence canonique, laquelle :

Dans un sens très large désigne la science du droit et englobe alors, au-delà du phénomène juridictionnel, la "doctrine" appelée à analyser et à commenter les lois et les décisions de justice. En revanche, dans un sens plus restreint, la jurisprudence est intimement liée au fait juridictionnel, soit que le mot désigne l'ensemble des décisions rendues par les juridictions, soit que, dans un sens plus étroit encore, il serve à indiquer la façon dont telle ou telle difficulté juridique est habituellement tranchée par ces mêmes juridictions, notamment la façon dont ces dernières interprètent habituellement tel texte de loi, obscur ou ambigu¹⁰³.

À vrai dire, la richesse intrinsèque de la sentence réside dans sa qualité de réponse au cas singulier en litige. Or la singularité de chaque cas émane de la diversité de l'expérience humaine. Laquelle expérience se forge dans la pluri-dimension des rapports humains créateurs des faits juridiques. La sentence, en répondant aux difficultés plausibles pouvant émerger dans chaque domaine des rapports interpersonnels humains, aide à la constitution d'un corps matériel de normes casuistiques qui ne servent que de points de référence dans la résolution des problèmes similaires. En ce sens, elle apparaît sans contestation possible comme une source pourvoyeuse de la jurisprudence et contribue par la même occasion à enrichir la doctrine sur les questions obscures.

Cependant, la jurisprudence par elle-même ne constitue pas une valeur normative (*iurisprudentia legem non facit*)¹⁰⁴, étant plutôt d'ordre empirique. Cela pour mettre en relief son caractère de support technique, aidant à trancher des questions ponctuelles, sans pour autant s'imposer comme norme à suivre dans la résolution du cas. Selon les perspectives du droit canonique, la jurisprudence n'est généralement pas admise dans la nomenclature des

¹⁰³ L. BACH, « Jurisprudence », dans *Guide juridique dalloz*, vol. 3, col. 319-1 à 319-3.

¹⁰⁴ Cf. c. CAPDEQUI, « Sentence du 3 mars 1989 (Bordeaux) », dans *Recueil de Sentences de Diverses Officialités Françaises*, 3 (1989), 17-24.

sources créatrices de la règle de droit. Dans le livre I du *CIC*, exposant les normes générales, il est plutôt question de la loi (cc. 6-22), de la coutume (cc. 23-28), des décrets généraux et des instructions (cc. 29-34). Toutefois, cette position admet une exception notable, car en matière strictement matrimoniale, il en va différemment. La jurisprudence assume plutôt un rôle important de source créatrice de droit¹⁰⁵. C'est d'ailleurs cette réalité qui préside à la naissance d'une loi suivant les allures que présente la synthèse de la jurisprudence sur une question donnée.

En outre, les sentences, intégrant la jurisprudence du système canonique, sont principalement celles qui émanent du tribunal de la Rote romaine en sa responsabilité particulière d'instance supérieure d'appel auprès du Siège Apostolique pour protéger les droits dans l'Église. À ce titre, seule sa jurisprudence fait autorité¹⁰⁶. L'une des fonctions particulières de ce tribunal est de veiller à l'unité de la jurisprudence de manière à se poser, par ses propres sentences, comme une aide aux tribunaux inférieurs¹⁰⁷. Le terme "unification" est à entendre comme : « La convergence de tous les organes juridictionnels sur une même interprétation d'une donnée normative et sur un même critère d'évaluation des faits soumis à jugement. Une sorte de cohérence et de concordance entre tous les opérateurs judiciaires, quels que soient les grades, les ordres, les lieux et les circonstances dans lesquelles ils œuvrent »¹⁰⁸.

3.2.2 — *Une solution aux lacunæ legis*

En scrutant le concept de sentence, un constat subtil se dégage quant à sa capacité à combler les vides juridiques lorsque le besoin s'impose dans la définition d'une cause. En fait, l'une des prérogatives de la fonction juridictionnelle naît non seulement du cadre assez restreint de la résolution des *lacunæ legis* telle que prévue au canon 19, mais aussi de la possibilité d'approfondir le contenu d'une norme qui reste fondamentalement immuable.

¹⁰⁵ Cf. M. POMPEDDA, « La giurisprudenza come fonte del Diritto nell'ordinamento canonico matrimoniale », dans *QSR*, 1 (1987), 47-72.

¹⁰⁶ Cf. c. EGAN, « Decisio 9 decembris 1982 (Birminghamien) », dans *RRT Dec*, vol. 74 (1987), 612, n. 3.

¹⁰⁷ Cf. JEAN-PAUL II, Const. Apost. *Pastor bonus*, 25 juin 1988, dans *AAS*, 80 (1988), 841-923, art. 126; A. STANKIEWICZ, « L'unità della giurisprudenza e il ruolo della Rota Romana », dans *QSR*, 20 (2010), 147-150.

¹⁰⁸ G. MONTINI, « La giurisprudenza dei tribunali apostolici e dei tribunali delle Chiese particolari », 117.

Dans son principe générique :

Pour qu'il y ait lacune de la loi, il est requis qu'après utilisation de tous les moyens d'interprétation, il faille constater ou bien qu'il y a absence de disposition légale applicable au cas qui se présente, ou bien que la prescription légale reste objectivement douteuse. Avant de pouvoir conclure qu'il n'y a point de disposition légale ou que celle-ci est objectivement douteuse, il faut avoir épuisé toutes les possibilités d'interprétation des normes existantes¹⁰⁹.

Le canon 19 indique qu'en pareilles situations, il faille recourir aux « lois portées pour les cas semblables, aux principes généraux appliqués avec équité canonique, à la jurisprudence et à la pratique de la Curie romaine, enfin à l'opinion commune et constante des docteurs ». La réception dans la *praxis* judiciaire canonique de la réalité des lacunes créatrices de vides juridiques¹¹⁰ a donné matière à réfléchir sur la capacité du juge de pouvoir émettre des solutions novatrices par rapport aux lois en vigueur dans la résolution d'une cause. De fait ne pouvant pas refuser de juger, ni renvoyer le demandeur à se pourvoir devant un autre tribunal (puisque l'ordonnancement canonique interdit le *non loquet*, cc. 1452 § 1, 1457 § 1), le juge, dans son obligation de rendre la justice, est comme inhibé en cas de *lacunæ legis*. Le code, en outre, ne lui concède pas de recourir au législateur pour solliciter la disposition légale qui fait défaut¹¹¹. À supposer que cela fût possible, ce serait en dehors de la voie judiciaire, par voie administrative. Ainsi, le droit reconnaît-il au juge, dans la stricte exécution de sa charge judiciaire, la possibilité de disposer de normes à caractères subjectifs que la sentence met si bien en avant¹¹². Ce procédé, que l'on qualifie "d'auto-intégration", traduit l'idée de la recherche des solutions aux problèmes de droit en restant dans

¹⁰⁹ W. ONCLIN, « Les lacunes de la loi en droit canonique », dans C. PERELMAN (dir.), *Le problème des lacunes en droit*, Bruxelles, Établissements Émile Bruylant, 1968, 185.

¹¹⁰ Cf. O. ÉCHAPPE, « Le pouvoir de gouvernement », dans P. VALDRINI et al. (dirs.), *Le droit canonique*, 2^{ème} éd., Paris, Dalloz, 1999, n. 320.

¹¹¹ Cf. R. NAZ, « Juges », dans *DDC*, vol. 6, 205-206; IDEM, *Traité de droit canonique*, vol. 1, Paris, Létouzey et Ané, 1954, 135.

¹¹² « En cas de lacune de la loi, le juge doit se prononcer et ne peut refuser de dire la loi sous prétexte du silence, de l'obscurité ou de l'insuffisance de cette dernière. Cette règle, qui est prescrite de façon formelle par le Code de Napoléon (art. 4) est implicitement affirmée par le Code de Droit Canonique de 1917, qui au c. 20 prescrit : « *Si certa de re desit expressum præscriptum legis sive generalis, sive particularis, norma sumenda est* ». Au sens de la doctrine canonique, ce canon impose au juge de trancher le litige qui lui est soumis et lui confère les pouvoirs nécessaires pour le faire en cas de silence de la loi. Le juge, qui à défaut légal et de coutume canonique applique les prescriptions du c. 20 et constitue une norme juridique, fait du droit nouveau, mais du droit à appliquer seulement au cas sur lequel il a se prononcer ». W. ONCLIN, « Les lacunes de la loi en droit canonique », 186-187.

la sphère exclusivement juridique¹¹³. Mais, il faut que celles-ci soient subordonnées aux conditions *sine qua non* que sont la précision et la cohérence *secundum doctrinam*. Dès lors, dans sa fonction d'application de la norme de droit au cas particulier, il peut advenir des circonstances dans lesquelles, par défaut ou par souci d'approfondissement d'une perspective, le juge émet des normes subjectives (*iudex facit legem trahendo de similibus ad similia*). Ce rôle supplétif, en devenant récurrent sur une question particulière à l'échelle universelle, finit par attirer l'attention du législateur sur le besoin parfois de créer des normes objectives contribuant à l'amélioration de situations pouvant affecter les institutions juridico-canoniques¹¹⁴. Il reste entendu cependant qu'avec rigueur, le pouvoir de créer la règle de droit relève de la compétence exclusive du législateur. En d'autres termes, la faculté, suivant la subtilité et la difficulté du cas d'émettre des normes supplétives compensant certaines insuffisances, n'érige jamais le juge en législateur.

Enfin, les normes subjectives créées par le juge pour suppléer aux *lacunæ legis* ne sauraient être revêtues des caractères d'une loi ordinaire¹¹⁵ surtout celui de la généralité qui s'impose à tous. Elles n'ont de valeur que subjective, c'est-à-dire relative aux sujets en cause. Elles sont donc marquées de la singularité. À ce propos, le canon 1642 § 2 est formel. La chose jugée jouissant de la stabilité du droit *facit ius inter partes*.

¹¹³ Il se différencie de "l'hétérointégration" qui consiste à sortir du champ matériel de la discipline juridique pour rechercher des solutions à un problème posé pour lequel il s'observe des lacunes de droit. C. LEFEBVRE, *Les pouvoirs du juge en droit canonique*, 73-74.

¹¹⁴ « La jurisprudence s'impose *non ratione imperii, sed imperio rationis*. Elle pourvoit aux cas que la loi ne prévoit pas, perfectionne la règle en tenant compte du progrès des sciences auxiliaires, spécialement, dans notre cas, de la médecine et de la psychiatrie. Elle peut ainsi corriger principes et maximes précédemment fixes, quand une réalité nosologique n'avait pas été suffisamment connue ». A. SABBATANI, « L'évolution de la jurisprudence dans les causes de nullité de mariage pour incapacité psychique », dans *StC*, 1 (1967), 145. La formation du c. 1095 est la preuve d'un cas typique de droit subjectif s'étant progressivement formé dans la jurisprudence de la législation précédente en guise de palliatif aux lacunes de la loi dans ce domaine. Voir les sources du c. 1095, dans Á. MARZOA et al. (dirs.), *Comentario exegético al Código de Derecho Canónico*, vol. 3/2, 1215.

¹¹⁵ La loi dans ses caractéristiques est marquée par la généralité, l'abstraction, la certitude, la stabilité ou la perpétuité juridique et l'extériorité. Cf. V. DE PAOLIS et A. D'AURIA, *Le norme generali, Commento al Codice di Diritto Canonico, Libro primo*, Rome, Urbaniana University Press, 2008, 91-97.

ADMINISTRATIVE JUSTICE IN THE PARTICULAR CHURCH*

JUSTIN GLYN, S.J.

SUMMARY — This article examines the various categories of administrative acts (focusing on singular administrative acts) as they apply to diocesan decision-making. First, it considers the various classes of administrative acts recognised by canon law and their application to specific diocesan decisions. In doing so, the A. considers the potential overlap between canon law and civil law of contract, especially the incorporation of the latter by cc. 1286 and 1290 and the potential safeguards which this offers to employees (whether or not they are recognised as holding a canonical office). Finally, the A. considers the general administrative procedure in cc. 50 and 51 and the constraints which this places on administrative discretion, noting that the substance of a decision will prevail over the form in determining the nature and effects of an act.

RÉSUMÉ — Cet article examine les différentes catégories d'actes administratifs (se concentrant sur les actes administratifs particuliers) dans la mesure où ils s'appliquent à la prise de décision au niveau diocésain. En premier lieu, il considère les différentes catégories d'actes administratifs reconnus par le droit canonique et leur application à des décisions diocésaines spécifiques. Ce faisant, l'auteur examine le chevauchement possible entre le droit canonique et le droit civil en ce qui a trait aux contrats, notamment l'incorporation de ce dernier par les canons 1286 et 1290 et les garanties éventuelles que cela offre aux employés (qu'ils soient, ou non, titulaires d'un mandat canonique). Finalement, l'auteur considère la procédure administrative générale que l'on retrouve dans les canons 50 et 51 et les contraintes que cela impose au pouvoir discrétionnaire de l'administration, notant que la nature et les effets d'un acte seront déterminés par la substance de la décision plutôt que sur la forme.

* This article was originally given as a presentation at the 43rd Annual Conference of the Canon Law Society of Australia and New Zealand held in Sydney NSW Australia 2-5 September 2019 and published in *CLSANZ Proceedings* 2019. It is reproduced here with permission of the CLSANZ.

Introduction

The bishop, as the head of a particular Church, has immediate, proper, and ordinary power in the diocese.¹ Such power is, however, not unconstrained. Unfortunately, as the Church in Australia is all too aware, it has not always been exercised justly or in accordance with canon law. Topically, on 30 April 2019, Catholic Religious Australia and the Australian Catholic Bishops Conference named a taskforce to review the governance of the Australian Church, including parishes and dioceses, to report back in 2020.² I do not propose to deal with everything currently being investigated by the taskforce. Rather, the intention of this paper, which is in some ways a companion to a previous study on religious life,³ is to highlight one specific area of governance, namely, the general constraints which canon law places on administrative decision-making in the interests of justice. Accordingly, this paper will briefly review the general law which seeks to ensure justice in administrative decision-making and, in the process, apply it to common situations within the particular Church.

1 — Overview of Administrative Acts

In common with most post-Enlightenment classifications, the Church understands authority as legislative, executive, and judicial.⁴ Administrative acts themselves may be described as juridic acts placed unilaterally by virtue of the executive power of governance *in nomine Ecclesiae* (in the Church's name) and on behalf of a public juridic person.⁵ While they may be similar in form to laws, their hallmark is their subordinate, accessory nature.⁶

¹ Canon 381 § 1. Compare also *CCEO* c. 178.

² CATHOLIC RELIGIOUS AUSTRALIA, "Respected Leaders Named to Conduct Church Governance Review in Response to the Royal Commission," press release, 1 May 2019, www.catholicreligious.org.au/mediareleases/2019/4/30/respectedleadersnamedtoconductChurch-governancereviewinresponsetotheroyalcommission.

³ J.E.A. GLYN, "The Right to Administrative Justice in Religious Institutes," in *StC*, 52 (2018), 103-138 [= GLYN, "The Right to Administrative Justice"].

⁴ Canon 135 § 1; *CCEO* c. 985 § 1.

⁵ J.M. HUELS, "Administrative Acts and Activity in Canon Law," in *The Canonist*, 6 (2015), 66 [= HUELS, "Administrative Acts and Activity in Canon Law"]; W.L. DANIEL, *The Art of Good Governance: A Guide to the Administrative Procedure for Just Decision-Making in the Catholic Church*, Gratianus Collection, Montréal, Wilson & Lafleur Limitée, 2015, 27 [= DANIEL, *The Art of Good Governance*].

⁶ F. URRUTIA, "Administrative Power in the Church according to the Code of Canon Law," in *StC*, 20 (1986), 270; M.R. MOODIE, "The Administrator and the Law: Authority and Its Exercise in the Code," in *Jur*, 46 (1986), 48-50.

In particular, while administrative acts bind those to whom they are directed, they cannot contravene existing legislation and, unlike legislation, are amenable to review by higher authority and, occasionally, even judicial control.⁷

It is important to keep these categories separate, especially when dealing with the particular Church. Bishops are legislators as well as administrators, and it is therefore especially important, when dealing with a document which emerges from a diocesan curia, to determine the threshold question of whether it is actually a legislative instrument (creating particular law) or an administrative act.

It is indeed true that administrative acts, like laws, may be general, i.e., decrees aimed at a broad audience. The 1983 Code makes a broad distinction based on who that audience is. If the administrative act is directed at those applying a given law, it will be an instruction. If it consists of those who are subject to a law, it will be a general executory decree.⁸ Instructions and general executory decrees are issued by Roman dicasteries and ordinaries, but they may not contravene a law. The history and practice of drafting—especially in Roman curial documents which has blurred the lines between general executory decrees and instructions and even been known to detach administrative decrees completely from legislation—has, however, led John Huels to posit a third category of “independent general administrative norms,” that is, norms of executive power which, unlike general executory decrees and instructions, are not dependent on any pre-existing legislation. These, like other forms of general decrees, are subject to legislation and cannot be issued by one without the relevant executive power. Nevertheless, independent general administrative norms (which are, in any event, rarely seen in a diocesan context) are still subordinate to law. General administrative acts, of whatever type, which contravene a law (whether particular or universal) have no effect.⁹

While general administrative acts are more common in the diocesan curia than in religious life, the most common form of administrative act—in the particular Church, as elsewhere—is the singular administrative act. These are acts directed at individuals. The current Code divides them into the following categories.

⁷ W.L. DANIEL, “The Singular Administrative Act in Canon Law,” in *StC*, 50 (2016), 201 [= DANIEL, “The Singular Administrative Act”].

⁸ Canons 31, 32, and 34. There is no equivalent of these canons in the Eastern Code.

⁹ Canon 33; J.M. HUELS, “A Theory of Juridical Documents Based on Canons 29-34,” in *StC*, 32 (1998), 337-370; IDEM, “Administrative Acts and Activity in Canon Law,” 66. Confusingly, “general decree” is used for both legislative and administrative acts. See PONTIFICAL COMMISSION FOR THE AUTHENTIC INTERPRETATION OF CANON LAW, reply, 5 July 1985, in *AAS*, 77 (1985), 771.

Rescripts and oral grants of favours – These are acts given primarily for the benefit of an individual (rather than a community) and are acts of grace, which presume that there is no right to have what is requested (c. 59). They are, by definition, favourable and are, unlike most administrative acts, explicitly said to be valid even if given orally (although such favours will, by definition be difficult to prove).¹⁰

Decrees – These are singular administrative acts issued by a competent authority by which decisions or provisions are made for particular cases according to the norm of law (c. 48). They may be favourable or unfavourable to the affected person. They need not be (but may be) preceded by a request. There are three categories of singular decrees: decisions, provisions, and precepts.

Decisions – Decisions are unilateral judgments on a particular set of facts. These will include such matters as administrative penal processes, removal or transfer of parish priests, the grant or denial of administrative recourse, and denial of requested favours.¹¹ In some ways, decisions are the administrative acts which are easiest to recognise: they clearly determine or limit rights and are the acts probably most clearly associated with executive power. Less often noted, however, is that a *failure* to make a decision is, itself, deemed a negative decision by the law and can give rise to remedies accordingly (cc. 57 § 1 and 57 § 2). A bishop, for example, who refuses to answer repeated requests from a priest to determine a particular matter has, therefore, *ipso facto* made a decision.

Provisions – These are generally favourable, but unlike favours in the strict sense, are directed at the community's wellbeing, rather than the individual's, and they need not be requested. In the diocesan context, they include such matters as appointment of a parish priest or the members of a diocesan council. Indeed, appointment to a parish or to some other office ("any stable function to be exercised for a spiritual purpose," according to c. 145) is a provision *par excellence*. These may, of course, benefit the individuals concerned (for example with a salary and a particular role), but they are primarily intended for the good of the broader community. In contrast to rescripts and orally granted favours, therefore, the individual cannot refuse

¹⁰ On the complications around oral administrative acts, see J. GLYN, "Not Worth the Paper It's Written on? Oral Singular Administrative Acts in Canon Law," in *The Canonist*, 9 (2018), 168-176, and sources cited there.

¹¹ Canon 48; *CCEO* c. 1510 § 2, 1°; HUELS, "Administrative Acts and Activity in Canon Law," 69; W.L. DANIEL, "The Singular Administrative Act in Canon Law," in *StC*, 50 (2016), 175-247, 202-210.

to accept or use them insofar as he is bound by obedience to the ordinary who issues the decree.¹²

It should be noted, too, that the issue of provisions, in the shape of appointment to an office or to other, more temporary roles, is an area where civil and canon law rights may overlap (as is envisaged by c. 22). As c. 192 notes, the terms of a contract may affect a bishop's right to remove a person who holds a particular office. Indeed, a number of canons assume that a role will be filled in terms of a specific agreement (e.g., c. 681 § 2, which requires an agreement to be drawn up between a diocesan bishop and religious institute on the operation of a work by the institute within the diocese, or c. 805 regulating the employment of teachers in Catholic schools in a diocese). The appointment of a parish priest under such an agreement will therefore be a canonical provision (and governed by cc. 50, 51, and 474, discussed below) but will simultaneously be a matter of contract.

The Code, of course, does not have any remedies for breach of contract, *per se*, and indeed explicitly provides (in c. 1290) that: "The general and particular provisions which the civil law in a territory has established for contracts and their disposition are to be observed with the same effects in canon law insofar as the matters are subject to the power of governance of the Church ..." Note that, by using the words "are to be observed with the same effect" (*eadem ... iisdem cum effectibus servantur*), the legislator has incorporated the relevant civil law into the canon law rather than disavowing jurisdiction. It is, of course, true that, as John Renken notes, the incorporation in c. 1290 is not unqualified but is subject to the caveat that that the contractual term not be contrary to civil or canon law.¹³ (The insertion of such a term in a contract between a diocese and an officer, however, would itself raise more questions and potentially give rise to additional remedies.) Likewise, given that the canon appears in Book V, dealing with temporal goods, one should be hesitant to apply it too generally. Nevertheless, most contracts, particularly those relating to employment, have a monetary or other patrimonial aspect—and there are no provisions relating to formalities

¹² Canon 71; V.M. MENEZES, "Singular Acts of Executive Power: An Examination of Title IV of Book I of the 1983 Code," in V.G. D'SOUZA (ed.), *In the Service of Truth and Justice: Festschrift in Honour of Prof. Augustine Mendonça, Professor Emeritus*, Bangalore, St Peter's Pontifical Institute, 2008, 389-424, 404. DANIEL, "The Singular Administrative Act in Canon Law," 193-194; J.M. HUELS, "Determining the Correct Canonical Rules for Ambiguous Administrative Acts," in *StC*, 37 (2003), 5-54, 35, 38-39; DANIEL, *The Art of Good Governance*, 28.

¹³ J.A. RENKEN, *Church Property: A Commentary on Canon Law Governing Temporal Goods in the United States and Canada*, Staten Island, NY, Society of St Paul, 2009, 243-245 [= RENKEN, *Church Property*].

of contracts elsewhere in the Code. The conclusion that c. 1290 applies here is bolstered by the general rule that the faithful can approach a canonical court to remedy a right which they possess in the Church (c. 221 §1). It seems therefore quite reasonable to read c. 1290 as indicating the rules by which such justice is done when it comes to contracts entered into pursuant to canon law. This reading is further strengthened by c. 1286 which *does* expressly apply to employment contracts and is discussed further below. The consequence of applying c. 1290 to provisions made by contract is that, in determining the matter before it, the canonical court will have to apply the civil law relating to the contract (unless it is clearly contradicted by the canon law). This will be true regardless of whether the position to which a person has been appointed is or is not a canonical office within the strict terms of c. 145.

Accordingly, in cases where there is a contract of some sort between a diocese and an individual giving effect to the canonical provision, the parties will, depending on the terms of the contract, potentially have concurrent remedies against the other in both civil law and canon law courts for any breach (with the relevant civil law determining the nature and scope of any remedy). Paradoxically, a mindset which would see civil law alone as a panacea for reforming the governance of the Church can overlook areas where canon law itself makes provision for the civil law to play an important and creative role in protecting the rights of the faithful—regardless of whether the role concerned is a true office within the meaning of the Code or not. This can be seen as an example of the interconnectedness with the world to which the Church is called.

Indeed, contractual remedies (where they exist) may actually be the most effective tools to hand for two reasons. First, given the “civil law” biases of most dioceses, advice on how to proceed in a civil law case is likely to be easier to come by than the relatively uncharted and less used area of canonical administrative law. Secondly, c. 1400 §2 provides that, except in case of fraud (c. 125), administrative remedies in canon law cannot be pursued except through a canonical administrative tribunal—with the only one currently in existence being the Apostolic Signatura in Rome (a solution recognised as inadequate even by the drafters of the Code).¹⁴ If, however, the dispute is contractual, rather than administrative, then c. 1400 §2 will not apply to oust a canonical court’s jurisdiction.

¹⁴ T.J. PAPROCKI, “The Method of Proceeding in Administrative Recourse and in the Removal and Transfer of Pastors [cc. 1732-1752],” in *CLSA Comm*2, 1824-1826; J.C. MESZAROS, “Procedures of Administrative Recourse,” in *Jur*, 46 (1986), 107-141; K. MATTHEWS, “The Development and Future of the Administrative Tribunal,” in *StC*, 18 (1984), 3-233.

In this regard, too, it should be remembered that c. 1286 obliges administrators of goods (such as the bishop of a diocese) to observe both the civil law of employment and Catholic social teaching in dealing with employees as well as to pay a just and decent wage such as will support both the employee concerned and their dependents. It should be noted that this applies to clergy as well as to lay workers and may actually mandate better employment conditions than either the civil or canon law on their own could achieve.¹⁵ As both canon law (and the relevant Catholic social teaching) and civil law may each contain safeguards that the other does not, this canon places a powerful protection on the rights of employees. For example, canon law, although often unevenly applied in practice, may contain limited safeguards in relation to posts which are not canonical offices (which might be supplemented by civil law). By contrast, civil laws allowing an employer to restrict union activity may run afoul of canon law. Again, these norms will apply regardless of whether the provision is of an “office” in the narrow canonical sense of the word, that is, a position in the Church acquired by a means of a canonical provision (cc. 157-183).

None of this is a guaranteed bulwark against all possible injustice, though. While there is no general provision in the Code for loss of office on reaching a given age, c. 186 does provide that loss of office by expiry of a term (as will occur for most parish priests in the Australian and New Zealand contexts) is actually effected by *notice* of the effluxion of the term rather than by the passage of time itself. While this may be beneficial to the person concerned if it is done in cooperation with the bishop (e.g., by allowing a priest to reach a statutory pension age), it is clearly open to exploitation by an unscrupulous ordinary, who may for example leave an elderly priest in place years beyond the expiry of the term despite repeated petitions to be allowed to go gently into that good night! That said, the denial of a request to be removed, or indeed the unreasonable failure to respond to such a request (c. 57), will *in itself* be a *decision* (as discussed above) and will be governed by the general administrative norms of the Code (discussed below). Since the Code currently makes expiry of the time period conditional on notification, which represents an unhealthy lacuna in the law, it therefore would be prudent for priests whose term is about to expire specifically to notify the ordinary of this fact and request a timely decision.

Provisions may also be made by *licentiate*, permissions to do something (such as to minister in a rector’s church with permission – c. 561).

¹⁵ RENKEN, *Church Property*, 228-231.

Procedurally, however, these are treated as if they were grants of favours (c. 59 § 2) which, indeed, many of them are.¹⁶

Precepts – These enjoin the observance of the law by commanding a person to do, or refrain from, an act. They may be expressly backed by the threat of penal action (penal precepts, c. 1319) and, in the latter case, will be subject to the specialised procedures which penal law provides for protection of rights as well as to the general administrative procedures considered below.¹⁷

It is clear that ordinaries have a wide variety of administrative powers. Nevertheless, these do not exist in a vacuum. Some of the most neuralgic issues within the context of the particular Church go to the question of how the act is placed, i.e., what must be done prior to the placement of an act and the formalities by which the act is done.

2 — *The General Administrative Procedure*

The right of access to justice which is granted in general terms by c. 221, especially in its first paragraph, is given particular force by cc. 50 and 51 of the Code. In the case of diocesan decisions, these are reinforced by c. 474, which requires acts of the diocesan curia to be signed by the ordinary for validity and witnessed by a notary for liceity. While the law may, in addition, demand specific administrative procedures (for example in the removal or transfer of parish priests, cc. 1740-1752), these norms apply to *all* administrative acts, at least those which are coercive in nature. A bishop, for example, who is investigating the question of whether a priest incardinated in his diocese may have breached his obligations of celibacy (c. 277), or who is considering whether or not workplace-bullying may have occurred, will—in addition to any civil law considerations—need to apply what is sometimes called the “general administrative procedure” in cc. 50 and 51. It is true that these procedures are not generally seen as required for validity. That said, the Apostolic Signatura has been prepared to use non-compliance with these procedures as being at least a supporting ground in rescinding an act in question.¹⁸

¹⁶ J.M. HUELS, “Permissions, Authorizations and Faculties in Canon Law,” in *StC*, 36 (2002), 25-58. Note, however, that *CCEO* c. 1510 classifies the *licentia* as one species of rescript.

¹⁷ Canons 48, 59 § 2, 1319; *CCEO* cc. 1406, 1510 § 2, 1°, 2°, 1513 § 5; DANIEL, “The Singular Administrative Act in Canon Law,” 222-228; HUELS, “Administrative Acts and Activity in Canon Law,” 69.

¹⁸ SUPREME TRIBUNAL OF THE APOSTOLIC SIGNATURA, *coram* SABBATANI, 20 January 1986, prot. no. 17156/85 CA, reported in DANIEL, *Ministerium Iustitiae*, 111-136; DANIEL, *The Art of Good Governance*, 130.

Canon 50 states that the issuer of *any* decree must seek the necessary information and proof and consult with those whose rights could be harmed.¹⁹ Seeking information will generally require a hearing of some sort. William Daniel distinguishes three phases of a valid administrative decision made under c. 50. The first is the preliminary investigation (*instruction*), which is really a collation of relevant information to allow the decision-maker to ascertain whether a decision is warranted at all.²⁰ This is followed by the *hearing* of affected persons (the assumption being that the superior has reached the preliminary view that something needs to be done and now needs to hear the other side in order to determine whether or not this preliminary view is correct), and then the *evaluation* of the evidence which has been set out before the superior finally places the act.²¹ While some administrative measures are additionally regulated by the Code (see, e.g., cc. 1720, in respect of penal matters dealt with administratively, or cc. 1740-1746, in relation to removal of parish priests), many are not. In these cases, however, c. 50 will still apply.

The general procedure in c. 50 does not provide for an automatic right to counsel, as there is, for example, during a penal process or hierarchical recourse (cc. 1723 and 1738). That said, a person does have the right to a defence as a matter of both principle and natural law (c. 221 § 1) and therefore the right to assistance in protecting their good name (c. 220) and in assuring the justice and transparency of the process.²² Accordingly, the mere presence of a “support person,” who is in fact forbidden from fulfilling any of these roles but whose presence serves merely as a pretence that some form of justice is being done, will not suffice.

Canon 51 requires decisions to be in writing and mirrors c. 37 in this respect. It is, however, subsumed where diocesan decisions are concerned in the requirement of c. 474 that, for validity, all acts of the curia issued by an ordinary must be signed by him (and therefore written).

Probably the most important safeguard of administrative justice in the Code, however, is that it looks to the effect of acts rather than how they are couched. As we have seen above, c. 48 defines decrees in terms of their

¹⁹ Canon 50; *CCEO* c. 1517 § 1. On the contested issue of the extent to which c. 50 applies to provisions, see GLYN, “The Right to Administrative Justice,” 122 and sources cited there.

²⁰ DANIEL, *The Art of Good Governance*, 139-145; J. MIRAS, “Singular Administrative Acts,” in *Exegetical Comm*, 527.

²¹ DANIEL, *The Art of Good Governance*, 146-158; MIRAS, “Singular Administrative Acts,” 528-550.

²² M.F. ROSINSKI, “Due Process to be Followed in the Administration of Discipline in Religious Institutes according to the Code of Canon Law,” JCD thesis, St. Paul University, Ottawa, 2016, 191-192.

substance (what they do) rather than their form (how they are crafted). While certain formalities are traditional—name, protocol number, recitals, background, date and place of issue, for example—none of these is essential to constitute a decree.²³ A bishop cannot, for example, evade the provisions of a canon which requires a decree to be issued (such as c. 1745, 3°, as to the removal or not of a parish priest) by simply offering to issue a letter. If the letter is in the name of the bishop and signed (as c. 474 demands), then the document is a decree—and will be required to comply with the Code.²⁴ The signature would be important in any event, especially if a third party were required to verify the document—for example, to carry out some aspect of it (cf. c. 40).

It is true that a document issued without some formalities might be illicit (especially if it lacks reasons or if the bishop's decision is not notarised) but, subject to any other provisions (e.g., c. 127 that invalidates an act which is not preceded by the required consent or consultation), it will be a valid decree nonetheless. Accordingly, both the persons affected and third parties will be entitled to rely even on an informally drafted letter when it comes to protecting their rights, for example, if it states that a particular matter is closed or that a request to leave office is refused (a decision), or that they are appointed to a given role (a provision).

Conclusion

As recent events have made clear, certain aspects of the exercise of the powers of bishops are ripe for reform—a process which has, to some degree, already begun. That said, this paper has suggested that some constraints on their powers, designed to ensure that their exercise is transparent and accountable, already exist. Admittedly, these are often overlooked by both Church authorities and their subjects. Probably the most important of these is the fact that the remit of administrative law, as the Church understands it, runs much more widely than is often remembered. Singular administrative acts, the most common form of executive action, include most exercises of power, however they are couched. (In the context of the particular Church, however, it will be important to distinguish exercises of executive power

²³ DANIEL, *The Art of Good Governance*, 169-170.

²⁴ See GLYN, "The Right to Administrative Justice," 122; SUPREME TRIBUNAL OF THE APOSTOLIC SIGNATURA, *coram* AUGUSTONI, 18 March 1995, prot. no. 24779/93 CA, reported in *L'attività della Santa Sede nel 1995*, Vatican City, Libreria editrice Vaticana, 1996, 847; DANIEL, *The Art of Good Governance*, 190-193.

from that of legislative power.) The mere informality of a decree, a refusal to use a standard form, or even refusal to make a decision at all will not save an exercise of discretion from being subject to scrutiny. Provisions, in particular, can be couched in a variety of forms—all of which will be recognised as subject to the controls in the Code.

However it is done, an act or omission will at least have to be preceded by a fair hearing with the opportunity for representations (including the right to put one's case with assistance, where necessary). It will also have to be in writing, signed by the bishop and witnessed. These safeguards are in addition to any specific requirements which the law might set for individual processes (such as the dismissal or transfer of parish priests).

In addition, where (as is often the case) the administrative act is also done in the process of implementing (or breaching) a contract between the diocese and the person concerned, the safeguards of the contract will also come into play—whether or not the person holds an “office” as canonically defined. While these provisions may allow a direct right of action in the civil courts, they will (thanks to c. 1290) also be directly enforceable in canonical courts. Not only does this mean that relief will be comparatively easier to obtain due to the fact that contractual provisions are not subject to the exclusion from tribunal jurisdiction contained in c. 1400 § 2 (which requires hierarchical redress followed by action before the Apostolic Signatura in Rome in order to enforce one's rights), but access to expertise in civil contract law is much easier to obtain than access to advice on canonical administrative law. In this regard, employees will also be protected by c. 1286, which requires employees to be afforded all the protections required by both civil law and Catholic social teaching—including to be remunerated in a manner which allows them to support themselves and their dependents.

THE VALID ADMISSION OF A GODPARENT IN LIGHT OF CANON 124 § 1

JOHN M. HUELS

SUMMARY — The principal aim of this study is to determine the requirements for the valid admission of a person to the role of godparent based on the general norm of c. 124 § 1 regarding the essential elements of a juridical act and the person capable of validly acting. Whereas invalid and ineffective acts are governed by the rule of c. 10 on invalidating and incapacitating laws, inexistent acts are not explicitly recognised in the law but are implied in c. 124 § 1. If a person is incapable of acting or is incompetent to act, or if an essential element of an act is lacking, it is unnecessary for the law expressly to state that the attempted act is invalid, because there is no semblance of an act in the legal sense. In light of this and other canonical norms, the study identifies eight conditions for the valid admission of a godparent.

RÉSUMÉ — L'objectif principal de cette étude est de déterminer les conditions pour l'admission valide d'une personne au rôle de parrain ou de marraine en se basant sur la norme générale du c. 124 § 1 concernant les éléments essentiels d'un acte juridique et la personne capable d'agir valablement. Alors que les actes invalides et inefficaces sont régis par la règle du c. 10 sur les lois irritantes et inhabilitantes, les actes inexistants ne sont pas explicitement reconnus dans la loi mais sont insinués au c. 124 § 1. Si une personne est incapable d'agir ou est incompétente pour agir, ou si un élément essentiel d'un acte fait défaut, il n'est pas nécessaire que la loi déclare expressément que la tentative d'acte est invalide, car il n'y a pas l'apparence d'un acte au sens juridique. À la lumière de cette norme et d'autres normes canoniques, l'étude identifie huit conditions pour l'admission valide d'un parrain ou d'une marraine.

Introduction

In a previous study in this journal, Tomasz Jakubiak demonstrated that the rule of c. 10 is not applicable to c. 874 on the qualifications of the godparent (*patrinus*) for baptism, which qualifications are the same for confirmation (cf. c. 893 § 1). Canon 10 says that invalidating and incapacitating (disqualifying)

laws are only those which expressly establish that an act is null or a person is incapable. Canon 874 has no such express statement of invalidity or incapacity. Yet, Jakubiak is convinced, on the basis of other canonical rules, that some of the qualifications of the canon are indeed for validity. He concludes:

It should be borne in mind that the invalidity of a juridical act may also result from the absence of an element which essentially constitutes the act itself, as is stipulated in canon 124 § 1. Some of the criteria listed in canon 874 which must be satisfied by godparents may be constitutive elements of taking up the office. Another important fact is that a juridical act is inherently an *actus humanus*. Consequently, someone incapable of a human act cannot validly serve as a godparent. These are just a few points to be considered in an evaluation of each of the criteria stipulated in canon 874 with respect to the validity of taking up the office of godparent. This is a matter requiring further investigation.¹

The purpose of this present study is to take up this challenge to investigate further which of the qualifications of c. 874—and requirements elsewhere in the law—are for the valid admission of a person to the role of godparent, and which are required only for liceity. Although this precise question may have but rare application in canonical and pastoral practice,² it is illustrative of the complex juridical rules and principles involved in distinguishing invalid acts from those that are merely illicit when the law itself is not expressly invalidating or incapacitating.

It should be noted that the law refers to the role of godparent as a *munus*, a term with various meanings and several English translations. At times, *munus* is equated in the law with the ecclesiastical office (*officium*) of cc. 145-196, as in the case of the *munus* of the Supreme Pontiff (c. 331), which is an ecclesiastical office acquired by election. The *munus* of the godparent is not an ecclesiastical office in the *strict sense*, however, since an office is acquired only by canonical provision, that is, by free conferral, presentation followed by institution, election with or without confirmation, or postulation followed by admission (cc. 157-183).³ Therefore, *munus* is

¹ Tomasz JAKUBIAK, “Is Canon 874 a Disqualifying Law?” in *StC*, 53 (2019), 431-447.

² From time to time, one hears of a parent who, for a serious reason, wants to substitute a new godparent, for example, when the original godparent has abandoned the faith. If it can be proven that the person originally designated for the role was not validly admitted, this substitution could be done. A parallel is the case of a godparent admitted after an emergency baptism when there had been no opportunity beforehand to designate someone for the role. See Rite of Baptism of Children, Chapter VI: Rite of Bringing a Baptized Child to Church, no. 169 (full citation given in footnote 23 below).

³ The *munus* of godparent is, nevertheless, an office in the *broad sense* of c. 145 § 1, which says that an office is any *munus* established by divine or ecclesiastical law for a spiritual purpose.

best not translated by the word “office” with respect to the *munus* of godparent. We prefer the word “role,” since the *munus* of godparent is not simply a temporary function performed during the liturgical rite of baptism or confirmation but a lifetime spiritual relationship.

A further word about terminology is needed, as the Latin word *patrinus* is translated differently. It is rendered as “sponsor” in both the CLSA and CLSGBI versions of the *Code of Canon Law* as well as in the CLSA translation of the *Code of Canons of the Eastern Churches*. However, the English translation of the liturgical rites for adult and infant baptism, granted the *recognitio* of the Apostolic See, render it “godparent.”⁴ The translation “godparent” is better because it clearly distinguishes the official canonical *patrinus* from another role in the Rite of Christian Initiation of Adults (RCIA), called the *sponsor* in Latin (and “sponsor” also in English).⁵ In the RCIA, the *sponsor* accompanies a candidate seeking admission as a catechumen and during the period of the catechumenate. According to the liturgical law, the sponsors are “persons who have known and assisted the candidates and stand as witnesses to the candidates’ moral character, faith, and intention” (RCIA 10). This sponsor may later also be designated as the godparent (*patrinus*), but the godparent’s official role in the RCIA begins only at the rite of election. At this point, the candidate or the community may choose either the sponsor or someone else to be the godparent.

This study is in four parts. The first part is on invalid, ineffective, and in-existent acts. The latter category of “in-existent acts” is not governed by the rule of c. 10, yet it is crucial for identifying the criteria necessary for the valid admission of a godparent. The second part surveys the liturgical laws, the *Directory for the Application of the Principles and Norms on Ecumenism*, and the *Catechism of the Catholic Church* to get a more complete understanding of the role of the godparent than can be known from the Code alone, and this information will be important for identifying the qualifications for valid admission to the godparental role. The third part identifies those criteria of c. 874 that are required only for the licit admission of a godparent, and it offers the reasons for this classification, thereby establishing a clear differentiation between illi-city and invalidity. These first three parts together provide the necessary background for the fourth part which examines the requirements for the valid admission of a godparent, both those in c. 874 and elsewhere in the law.

⁴ Inconsistently, the translation of *patrinus* is “sponsor” in the rite of confirmation.

⁵ For further discussion of this point, see Kevin T. HART, in CLSA *Comm2*, 1060-1061; and John M. HUELS, *The Catechumenate and the Law: A Pastoral and Canonical Commentary for the Church in the United States*, Chicago, Liturgy Training Publications, 1994, 43-45. The full reference to the RCIA is given in footnote 22 below.

1 — *Invalid, Ineffective, and Inexistent Acts*

In the canonical system, juridical acts may not only be valid or invalid. Sometimes an act may be valid but ineffective. Moreover, there may be “non-acts” that have some semblance of a juridical act but are really inexistent. The first two categories of acts, those that are invalid and ineffective, are governed by c. 10 of the Code (*CCEO*, c. 1495). Authors sometimes use the term “textual nullity” with reference to invalid and ineffective acts, because the basis for the invalidity or ineffectiveness is expressly stated in the text of the law, whether explicitly or implicitly. The third category of inexistent acts has no similar general norm, although such “non-acts” are recognised in the canonical doctrine. An inexistent act cannot be sanated, nor can the Church supply power of governance in common error or positive and probable doubt. Thus, we must consider three categories pertinent to our theme: invalid acts, ineffective acts, and inexistent acts.

1.1 — Invalid and Ineffective Acts

Canon 10 treats ecclesiastical laws that are invalidating and incapacitating (*leges irritantes et inhabilitantes*). According to the canon, laws are invalidating or incapacitating only when the law expressly, whether explicitly or implicitly, establishes that an act is null or a person is incapable of acting. Certain words in the law *explicitly* signify nullity, such as *nullus*, *nullitas*, *irritus*, *validus*, *invalidus*, *valide*, *invalidè*, *ut valeat*, *dirimens* (e.g., c. 1077 §2), *capax*, *incapax*. The use of such explicit terminology makes it easy, even for the non-canonist, to know whether a law is for validity or whether a person is capable of validly placing a given act. Certain terms in canon law expressly but only *implicitly* signify nullity. For example, c. 167 §1 states that votes cast by letter or by proxy are excluded unless otherwise legitimately provided in the statutes. The word “excluded” (*exclusa*) implicitly indicates that a vote cast by letter or proxy is invalid unless this is permitted in the statutes. Some other examples of terminology indicating implicit nullity are *pro infectus habetur* = the act is considered infected (c. 1406 §1); *nequit* = is unable to, cannot (c. 293); *excludi potest* = can be excluded (c. 689 §1); *non haberi, nihil agere, nihil agi* = nothing is done, nothing happens (c. 133 §1); *non consistere potest* = cannot exist (c. 1089).

It should be noted that some words which may indicate an invalidating law are ambiguous, that is, the word may indicate validity or only liceity, depending on the text and context of the law. Such ambiguous words may also be incapacitating laws, implicitly rendering anyone incapable of acting other than the

person specified in the law, or they may be for liceity only. For example, the words *solus*, *tantum*, or *tantummodo* may indicate liceity or validity. Canon 253 § 1 states that the bishop is to appoint as seminary professors only (*tantum*) persons who excel in virtues and have a doctorate or a licentiate from a university or faculty recognised by the Holy See. If the bishop were to appoint someone with a doctorate from another university, the appointment would be illicit but not invalid. This is evident from the context, as the requirement of a pontifical degree is coupled with another requirement that is always for liceity only, namely, that those to be appointed are to be outstanding in virtues (*virtutibus praestantes*). On the other hand, the same word *tantum* often indicates implicitly a requirement for validity. For example, c. 359 says that, when the Apostolic See is vacant, the college of cardinals enjoys only (*tantum*) the power granted to it in special law. Here the word “only” implies an incapacitating law. The college of cardinals has no other power during the vacant see except that granted by the special laws. If the cardinals were to attempt to perform other juridical acts (e.g., to promulgate laws), such acts would be invalid because the college would lack the necessary power.

The word *solus* (sole, alone, only) often functions in the same way as *tantum*, as in c. 969 § 1 which states that the local ordinary alone (*solus*) is competent to grant to presbyters the faculty to hear the confessions of any of the faithful. Thus, the faculty to hear confessions granted by the competent superior to members of clerical religious institutes and societies of apostolic life is not valid for any of the faithful but only for the superior’s own subjects and those who stay in the house day and night (c. 969 § 2). Examples of other words that may indicate validity or only liceity, depending on the context, include *removere* = remove (c. 810 § 1 = liceity; c. 1422 = the removed judge cannot validly function); *posse, non posse* = can, cannot (c. 1015 § 2 = liceity; c. 193 § 1 = validity); *habilis, inhabilis* = capable, incapable (cc. 1041, 1°, 228 § 1 = liceity; c. 171 § 1, 1674 = validity).⁶

In addition to words that expressly indicate that an act is invalid or that a person is incapable of acting, certain other words governed by the rule of c. 10 indicate that an act is validly placed but juridically without any effect, that is, it is an “ineffective act.”⁷ For example, c. 62 says that a rescript

⁶ Some other ambiguous expressions are *non spectare, non pertinere, ius non esse, non competere, sine facultate, sine indulto, sine concessione, reservare, sine causa, non esse*. See Markus WALSER, *Die Rechtshandlung im kanonischen Recht : Ihre Gültigkeit und Ungültigkeit gemäss dem Codex Iuris Canonici*, Göttingen, Cuvillier, 1994, 28-42.

⁷ See Roberto PALOMBI, “Inefficacia e revocabilità dell’atto giuridico in diritto canonico,” in ARCISODALIZIO DELLA CURIA ROMANA (ed.), *L’atto giuridico nel diritto canonico*, Studi Giuridici 59, Libreria Editrice Vaticana, 2002, 143-154.

requiring execution has effect (*effectum habet*) at the moment of execution. The rescript itself is already valid from the moment it is issued by the competent authority, but it has no effect until the executor has completed his mandate. Among other words that expressly indicate a valid but ineffective act are *vim non habent* = do not have force (c. 1617); *omni vi carent* = lack all force (c. 33 § 1); *effectu caret* = lacks effect (c. 38); *ut vim habeat* = in order to have force (c. 181 § 1); *ut effectum sortiatur* = that it may obtain effect (c. 190 § 3); *effectum non habet* = has no effect (c. 177 § 1); *effectum tantummodo obtinet [a momento, a die]* = obtains effect only from [the moment, the day] (cc. 47, 62, 186). In addition, some valid acts are ineffective when an accompanying act has not occurred, such as the confirmation, approval, or *recognitio* of a higher authority. For example, the conferences of bishops have the power to approve by general decree (cf. c. 455) legitimate adaptations of the liturgical books, but such a decree has no effect without the *recognitio* of the Apostolic See (c. 838 § 2);⁸ or, an election requiring the confirmation of higher authority is a valid act of the electors, but the one elected has no right to the office unless the election is confirmed (c. 179).⁹

1.2 — Inexistent Acts

Canon 10 is in Title I of Book I of the Code on *ecclesiastical* laws. Thus, the rule of the canon—that ecclesiastical laws must expressly state when a law is invalidating or incapacitating—does not apply to requirements of the divine law, for example, the use of reason required to place any human act, the requirement of the power of order to celebrate certain sacraments, the matter and form of the sacraments, and the intention necessary to celebrate and receive sacraments. If a requirement of the divine law is lacking, the act is not just invalid but inexistent. Canon 10 also does not apply to what is called in the canonical doctrine “virtual nullity,” or “inexistence.”¹⁰ This

⁸ FRANCIS, Apostolic Letter m.p. *Magnum principium*, 9 September 2017, in AAS, 109 (2017), 967-970, at 969. Canon 638 § 2. “Apostolicae Sedis est sacram liturgiam Ecclesiae universae ordinare, libros liturgicos edere, aptationes, ad normam iuris a Conferentia Episcoporum approbatas, recognoscere, necnon advigilare ut ordinationes liturgicae ubique fideliter observentur.”

⁹ It should be noted that the *ius ad rem* of c. 178 is the *right to seek confirmation* of the election to office, not the right to the office itself, as mistakenly translated in the CLSGBI and CLSA versions of the Code.

¹⁰ See OLIS ROBLEDA, *La nulidad del acto jurídico*, 2nd ed., Analecta Gregoriana 143, Rome, Libreria Editrice dell’Università Gregoriana, 1964, 207-214; RENATO BACCARI, “Dubitationes de inexistencia iuridica actuum in iure canonico,” in *EIC*, 8 (1952), 134-139; Aloysius BRESSAN, “De inexistencia et nullitate actus iuridici in C.I.C.,” in *Per*, 59 (1970), 471-483;

refers to the lack of an essential element, whether of the divine or the ecclesiastical law, or of the radical capacity to place an act or assume a position.

The category of the inexistent act is not explicitly found in the law but is reflected in c. 124 § 1, which refers to “those things that essentially constitute the act itself.”¹¹ If a constitutive, or essential, element is missing, there is no need for the law to say the act is invalid, because effectively there is no act in the legal sense. What may have the semblance of an act is juridically inexistent. For example, c. 112 § 1, 1° requires the permission of the Apostolic See to transfer from one’s Church *sui iuris* to another (apart from the cases of the spouse and children governed by c. 112 § 1, 2° and 3°). The law does not state that this permission is needed for the validity of the transfer. This is because the permission itself is the essential element of the transfer. The transfer is valid from the moment the permission is granted, but normally it takes effect only when the person makes the declaration of c. 112 § 3.¹² Without the prior permission of the Apostolic See, however, this declaration would have no effect. There could be no transfer, nor could an attempted transfer be sanated, as it would never have existed in law unless the prior permission to transfer had been granted.¹³ The category of the inexistent act brings with it the knowledge and awareness that it is unnecessary to define in the law all the categories of invalidity for the many different juridical acts in canon law.¹⁴

Another example is c. 607 § 2, which in part defines a religious institute as a society in which the members profess public vows of poverty, chastity, and obedience. The law does not state that the vows must be public—professed before the competent superior (c. 656, 5°)—for the validity of profession in a religious institute. This is because the public nature of the vows is

and Benito GANGOITI ELLORIA, “La problemática de la inexistencia y nulidad de los actos y negocios jurídicos en el Código de Derecho Canónico,” in *Angelicum*, 43 (1966), 225-242.

¹¹ Canon 124 — § 1. Ad validitatem actus iuridici requiritur ut a persona habili sit positus, atque in eodem adsint quae actum ipsum essentialiter constituunt, necnon sollemnia et requisita iure ad validitatem actus imposita.

¹² FRANCIS, Apostolic Letter m.p. *De concordia inter Codices*, 15 September 2016, in *AAS*, 108 (2016), 602-606, at 604. The new third paragraph of c. 112 states: “Omnis transitus ad aliam Ecclesiam sui iuris vim habet a momento declarationis factae coram eiusdem Ecclesiae Ordinario loci vel parrocho proprio aut sacerdote ab alterutro delegato et duobus testibus, nisi rescriptum Sedis Apostolicae aliud ferat; et in libro baptizatorum adnotetur.”

¹³ See Helmuth PREE, “On Juridic Acts and Liability in Canon Law: Part One,” in *Jur*, 58 (1998), 41-83, at 50.

¹⁴ Roberto BAURA, “Il sistema delle invalidità e nullità; annullabilità e rescindibilità dell’atto giuridico,” in ARCSODALIZIO DELLA CURIA ROMANA (ed.), *L’atto giuridico nel diritto canonico*, 121-142, at 129.

an essential, defining element of religious life. A person who professes private vows is not a religious in canon law. Similarly, c. 1057 § 1 says that consent makes a marriage. It does not say such consent is necessary for the validity of the marriage. It is *the* essential element, in virtue of the divine law, by which marriage validly comes into being, whether it be natural or sacramental marriage. If consent does not exist or is defective, there is no marriage, even if all other requirements for validity have been observed. The union may have the external appearance of an existent marriage, but legally there was no marriage from the beginning because, so to speak, it was “not born.”¹⁵ In the case of an attempted marriage in which consent was lacking or defective, a sanation may only be granted from the moment that consent was later given (c. 1162 § 1).

An inexistent act may also result from the fact that the person who attempted the act is radically *incapable* of placing the act or is *incompetent* to place it.¹⁶ *Capacitas* refers to the ability to place private acts. All the baptized are capable for placing private juridical acts (cf. c. 96) unless the law specifies otherwise. For example, c. 643 § 1 establishes the qualifications for a person to be admitted validly to the novitiate. Not included in the list is the fact that the applicant must be baptized. The law does not need expressly to say that this is a requirement for valid admission, as the unbaptized are radically incapable of belonging to a religious institute.

Competentia is the ability to place public acts, not done as a private person but by virtue of a public office or an order in the Church. Laws assigning competence are constitutive and not governed by the rule of c 10. When the law attributes competence to a certain official or ordained minister to place a certain act, it does not need to say that this competence is for the validity of the act. If someone incompetent attempted to place the act, it obviously would be invalid. For example, c. 312 § 1, 3° says that the diocesan bishop is the authority competent to erect public associations in his own territory. The canon does not expressly state that only the diocesan bishop is the competent authority within the diocese validly to erect such associations, but this is unnecessary. Since the law says that he is the competent authority, no lower official is competent. Thus, if the vicar general, without a mandate

¹⁵ “*Ad existentiam actus iuridici necesse est ut praesto sit ea elementa omnia quae ad esse ipsum actus constituendum requiruntur, scilicet quae actum essentialiter constituunt, quibus existentiae habere possit, reapse non est seu, ut ita dicamus, non nascitur.*” See Willy ONCLIN, “De requisitis ad actus iuridici existentiam et validitatem,” in *Studi in onore di Pietro Agostino d’Avack*, vol. 3, Milan, Giuffrè, 1976, 397-419, at 411 (= ONCLIN, “De requisitis ad actus iuridici existentiam et validitatem”).

¹⁶ *Ibid.*, 405-406.

from the diocesan bishop, issued a decree of erection, the public association would not be established. The decree would be “inexistent” in that its author lacked the competence to issue it. Concerning competence by an order, an example is seen in the law specifying that the sacred chrism must be blessed by a bishop (cc. 847 § 1, 880 § 2), that is, by any validly ordained bishop. These canons do not expressly state that only a bishop may validly consecrate the chrism, nor is this necessary, since this is evident by the law attributing the competence to a bishop and no other. If a presbyter, even the diocesan administrator, attempted to consecrate the chrism, the act would have no effect.

To sum up, the rule of c. 10 on invalidating and incapacitating laws pertains to textual nullity when the consequence of invalidity, incapacity, or ineffectiveness is expressly stated in the law, whether explicitly or implicitly. Canon 10, situated in Title I on *ecclesiastical* laws, does not apply to the divine law. The ecclesiastical law does not have to state expressly that a given divine law is required for validity, since the divine law is always binding. Canon 10 likewise does not apply to virtual nullity, that is, to an essential element of an act which, if lacking, means there is no act, that what may have the semblance of an act is legally inexistent. In addition, the legislator does not have to specify that laws assigning capacity and competence are for validity. If someone is incapable of placing an act, or incompetent to do so, an attempt to place the act would have no recognition in the law; it would be inexistent, a “non-act.”

The implications of all this with respect to the valid admission of a godparent will be seen later in this study, but first we must turn our attention to a consideration of the nature of the godparental role and the obligations inherent in it. This, too, is necessary background for determining who is capable of validly being admitted to the role of godparent.

2 — *The Role of Godparent*

In this second part of our study, we shall examine several official texts of the Church concerning the role (*munus*) of godparents. We begin with legislative sources: the Latin and Eastern Codes and the liturgical laws of the Roman Rite. There follows the treatment on godparents in the *Directory for the Application of the Principles and Norms on Ecumenism (DAPNE)*, the norms of which are general executory decrees (cc. 31-33). We conclude with a brief statement from a magisterial source, the *Catechism of the Catholic Church*.

2.1 — The Codes

The Latin Code has a very brief statement on the role of godparents for baptism in c. 872. In adult initiation, the godparent is to assist (*adstare*) the person in Christian initiation. For the baptism of infants, the godparents and the parents present the child for baptism and help the baptized to lead a Christian life and faithfully to fulfil the duties inherent in baptism.¹⁷ The comparable canon in the *Code of Canons of the Eastern Churches* (CCEO c. 684 §2) is quite similar. It says that, in fulfilling this role, the godparent is to assist in the Christian initiation of one who is no longer an infant or, for the baptism of an infant, to present the infant and help the baptized to lead a Christian life in harmony with baptism and fulfil faithfully the obligations connected with it.¹⁸ The Codes distinguish the godparents' role at adult initiation and infant baptism. In very general terms, godparents *assist* in adult initiation and, with respect to infant baptism, they and the parents help the baptized to lead a Christian life and fulfil the duties that come with baptism.

The godparent for confirmation is treated in c. 892 which says, insofar as possible (*quantum id fieri potest*), there should be a godparent (sponsor),¹⁹ who is to take care that the person confirmed acts as a true witness of Christ and faithfully fulfils the obligations inherent in this sacrament. Unlike c. 873, which allows both a godmother and a godfather at baptism, c. 892 only speaks of one *patrinus* at confirmation. However, it is possible to have two, especially if they are already the godparents, since the law encourages this continuity.²⁰ Moreover, the law does not expressly prohibit two confirmation sponsors, even if it only requires one insofar as possible. What is not forbidden is allowed.

The gravest obligation binding godparents is found in Book III of the Code in a chapter on catechetical formation (*De catechetica institutione*). After stating that parents above others are bound by obligation to form their children by word and example in the faith and the practice of the Christian

¹⁷ Canon 872. Baptizando, quantum fieri potest, detur patrinus, cuius est baptizando adulto in initiatione christiana adstare, et baptizandum infantem una cum parentibus ad baptismum praesentare itemque operam dare ut baptizatus vitam christianam baptismis congruam ducat obligationesque eidem inhaerentes fideliter adimpleat.

¹⁸ CCEO c. 684 §2. Patrini ex suscepto munere est baptizando, qui infantia egressus est, in initiatione christiana astare vel baptizandum infantem praesentare atque operam dare, ut baptizatus vitam christianam baptismis congruam ducat et obligationes cum eo cohaerentes fideliter impleat.

¹⁹ As noted above in note 4, the English translation of *patrinus* in the Rite of Confirmation is not “godparent” but “sponsor.” The Latin term, however, remains the same in both the Code and the liturgical books.

²⁰ See c. 893 §2 and the Rite of Confirmation, no. 5, cited below in footnote 25.

life, c. 774 §2 then says that those who take the place of parents and the godparents are bound by an equal obligation (*pari obligatione adstringuntur*). The Eastern Code has the same obligation in c. 618, which uses an equally forceful command (*pari obligatione tenentur*). In both Codes, the godparents as well as the parents are strongly bound by law to set an example for their children / godchildren so that by word and deed the children are formed in the faith and the practice of the Christian life.

2.2 — The Liturgical Laws

A fuller understanding of the *munus* of the godparent emerges from a review of the liturgical laws of the Roman Rite.²¹ These are found in four sources: the Rite of Christian Initiation of Adults (RCIA);²² the Rite of Baptism of Children (RBC);²³ the General Introduction to Christian Initiation (GICA), which prefaces the Rite of Baptism;²⁴ and the Rite of Confirmation.²⁵ An overview of the godparental role is seen in the General Introduction to Christian Initiation (nos. 8 and 9).

8. It is a very ancient custom of the Church that adults are not admitted to baptism without godparents, members of the Christian community who will assist the candidates at least in the final preparation for baptism and after baptism will help them persevere in the faith and in their lives as Christians. In the baptism of children, as well, godparents are to be present in order to represent both the expanded spiritual family of the one to be baptized and the role of the Church as a mother. As occasion offers, godparents help the parents so that children will come to profess the faith and live up to it.

9. At least in the later rites of the catechumenate and in the actual celebration of baptism, the part of godparents is to testify to the faith of adult candidates or, together with the parents, to profess the Church's faith, in which children are baptized.

²¹ The English version of the liturgical laws is taken from *The Rites of the Catholic Church as Revised by the Second Vatican Ecumenical Council*, prepared by the International Commission on English in the Liturgy (ICEL) and approved for use in the dioceses of the USA, New York, Pueblo, 1990, vol. 1.

²² *Ordo Initiationis christianae adultorum*, editio typica, 6 January 1972, Typis Polyglottis Vaticanis, 1972 (= *OICA*); adapted English version Rite of Christian Initiation of Adults, Washington, ICEL, 1985 (RCIA).

²³ *Ordo Baptismi parvulorum*, editio typica altera, 29 August 1973, Typis Polyglottis Vaticanis, 1973 (= *OBP*); Rite of Baptism of Children, Washington, ICEL, 1969 (= RBC).

²⁴ *Praenotanda generalia de Initiatione christiana*, in *OBP*, 7-13.

²⁵ *Ordo Confirmationis*, editio typica, 15 August, 1971, Typis Polyglottis Vaticanis, 1973 (= *OC*); Rite of Confirmation, Washington, ICEL, 1973 (= RC).

These liturgical laws, too, distinguish the roles of godparents for adult initiation and infant baptism. For adult initiation, godparents have three general responsibilities. (1) They assist the candidates for baptism at least in the final preparation for baptism; in the earlier stages of the catechumenate, a *sponsor* may take the place of the godparent, as discussed above in the Introduction to this study. (2) At least in the later rites of the catechumenate and in the actual celebration of baptism, the godparents testify to the faith of the adult candidates or, together with the parents, profess the Church's faith. (3) After sacramental initiation, the godparents help the baptized adult to persevere in the faith and in their Christian life.

For infant baptism, the godparents also have an important role. (1) The godparents are to be present at the ceremony since they "represent both the expanded spiritual family of the one to be baptized and the role of the Church as a mother" (no. 8). Thus, they have an important ecclesial role in representing the community of the faithful. (2) Godparents have an auxiliary role in helping the parents to raise the children in the faith. (3) During the rite of infant baptism, the godparents together with the parents profess the faith of the Church in which the infants are baptized. Thus, for both adults and infant initiation, the godparents have a role during the catechumenate / preparation phase and in the liturgical rites as well as an ongoing spiritual relationship that entails aiding the baptized to lead a good Christian life.

In the RCIA, the most important norm on godparents is no. 43 of the *praenotanda* (no. 11 of the English version). It says that the godparents accompany the candidates on the day of election, at the celebration of the sacraments of initiation, and during the period of mystagogy. The godparents are chosen by the candidates "on the basis of example, good qualities, and friendship, delegated by the local Christian community, and approved by the priest." The delegation of the godparent by the Christian community for adult initiation is not observed everywhere, and this omission may be considered a legitimate contrary custom (cc. 24-26).

As for the priest who approves the godparent, this is specified further in the General Introduction to Christian Initiation, no. 10, which says that this judgement belongs to the pastor of souls (*de iudicio animarum pastoris*). The "pastor of souls" in this context refers primarily to the pastor (parish priest), but it also includes others to whom the pastor explicitly or implicitly delegates this responsibility. The admission to the role of godparent is an act of executive power, so the pastor can freely delegate the faculty to admit godparents to others, whether by general or special delegation (c. 137), whether explicitly or implicitly. Or, even apart from a delegation, local custom may dictate that such admission may also be done by the parochial vicar, parish deacon, the minister

responsible for a parish without a pastor (c. 517 §2), et al. On the role and duties of the godparent, the norm of the RCIA 4 continues:

It is the responsibility of godparents to show the candidates how to practice the Gospel in personal and social life, to sustain the candidates in moments of hesitancy and anxiety, to bear witness, and to guide the candidates' progress in the baptismal life. Chosen before the candidates' election, godparents fulfil this office (*munus*) publicly from the day of the rite of election, when they give testimony to the community about the candidates. They continue to be important during the time after reception of the sacraments when the neophytes need to be assisted so that they remain true to their baptismal promises.²⁶

In the Rite of Baptism of Children, the role of the godparent emerges in the course of the rite itself. Early in the ceremony, the celebrant asks the godparents: "Are you ready to help these parents in their duty as Christian mothers and fathers?" The godparents respond, "We are" (no. 40). Later in the rite following the baptism, the celebrant makes it clear that the godparental responsibility is ongoing and that it is shared with the parents. He says to the parents and godparents: "you must make it your constant care to bring [these infants] up in the practice of the faith. See that the divine life which God gives them is kept safe from the poison of sin, to grow always stronger in their hearts. If your faith makes you ready to accept this responsibility, renew now the vows of your own baptism" (no. 56).

The Rite of Confirmation, like c. 893 §2, encourages that the godparent for baptism also be chosen as the sponsor for confirmation in order to express more clearly the link between baptism and confirmation and to make the role (*munus*) and duty (*officium*) of the sponsor more effective (OC 5). This role and duty are described briefly: "These sponsors bring the candidates to receive the sacrament, present them to the minister for the anointing, and will later help them to fulfill their baptismal promises faithfully under the influence of the Holy Spirit whom they have received" (OC 5). The same liturgical law allows parents to present their children for confirmation instead of the sponsors, but a parent cannot be admitted as the actual sponsor, as this is excluded by c. 874 §1, 5° (cf. c. 893 §1).

2.3 — The Ecumenical Directory

The *Directory for the Application of the Principles and Norms on Ecumenism* (DAPNE) treats the godparents in no. 98. It begins by stating that the godparents should be members of the Church or ecclesial community in

²⁶ OICA 43; RCIA 11.

which the baptism is celebrated. It says that they are undertaking a responsibility for the Christian education of the person being baptized (or confirmed), but this is not done just as a relation or friend. Rather, the godparents “are also there as representatives of a community of faith, standing as guarantees of the candidate’s faith and desire for ecclesial communion.” It goes on to say that baptized persons who belong to another ecclesial community may be admitted as a *witness* to the baptism together with a Catholic godparent. The Directory then adds that Eastern non-Catholic faithful may serve as an actual godparent together with a Catholic godparent “so long as there is provision for the Catholic education of the person being baptized, and it is clear that the godparent is a suitable one.”²⁷ Since the Eastern non-Catholic is not bound by canon law, the obligations of a godparent only bind the Catholic godparent, apart from obligations of the divine law such as seeking to lead a holy life and witnessing to the faith by word and deed (cf. cc. 210, 211; *CCEO* cc. 13, 14).

2.4 — The Catechism

The *Catechism of the Catholic Church* has one paragraph on godparents in a section on the relationship between faith and baptism. It says that the parents’ and godparents’ help is important for the grace of baptism to unfold. The godparents “must be firm believers, able and ready to help the newly baptized child or adult on the road of Christian life. Their task is a truly

²⁷ PONTIFICAL COUNCIL FOR PROMOTING CHRISTIAN UNITY, Directory *La recherche de l’unité*, 25 March 1993, in AAS, 85 (1983), 1039-1119. *DAPNE* 98 states: “It is the Catholic understanding that godparents, in a liturgical and canonical sense, should themselves be members of the Church or ecclesial Community in which the baptism is being celebrated. They do not merely undertake a responsibility for the Christian education of the person being baptized (or confirmed) as a relation or friend; they are also there as representatives of a community of faith, standing as guarantees of the candidate’s faith and desire for ecclesial communion.

“a) However, based on the common baptism and because of ties of blood or friendship, a baptized person who belongs to another ecclesial Community may be admitted as a witness to the baptism, but only together with a Catholic godparent. A Catholic may do the same for a person being baptized in another ecclesial Community.

“b) Because of the close communion between the Catholic Church and the Eastern Orthodox Churches, it is permissible for a just cause for an Eastern faithful to act as godparent; together with a Catholic godparent, at the baptism of a Catholic infant or adult, so long as there is provision for the Catholic education of the person being baptized, and it is clear that the godparent is a suitable one.

“A Catholic is not forbidden to stand as godparent in an Eastern Orthodox Church, if he/she is so invited. In this case, the duty of providing for the Christian education binds in the first place the godparent who belongs to the Church in which the child is baptized.”

ecclesial function (*officium*).” It adds that the whole ecclesial community also has some responsibility for the development and safeguarding of the grace given at baptism.²⁸ The word *officium* is translated in English here as “function” (also *fonction* in the French version).²⁹ It is a good translation in this context since, as discussed above in the Introduction, the godparent is an ecclesial *munus* but not an ecclesiastical office in the strict sense, as this *munus* is not acquired by means of canonical provision.

2.5 — Summation

In addition to several canons in both the Latin and Eastern Codes, the *munus* of the godparents is elaborated in other texts. Most notably these are liturgical laws and to a lesser extent the ecumenical directory (*DAPNE*) and the Catechism (*CCC*). The godparents’ role is symbolically very important in that they represent the ecclesial community. As for their responsibilities, these may be conveniently divided into three phases: the period of preparation; the celebration of the sacraments of initiation; and the ongoing, lifetime spiritual relationship between godparent and godchild.

In the preparation for the baptism of infants, the godparents and the parents are to be properly instructed on the meaning of this sacrament and on the obligations that arise from it (c. 851, 2°; *CCEO* c. 686 § 2). During the catechumenate prior to adult initiation, the godparents testify to the faith and character of the candidates, and they assist the candidates by showing them how to practice the Gospel in personal and social life, by sustaining them in times of doubt or trouble, and by bearing witness to the Christian life.

During the celebration of the rite of infant baptism, the godparents together with the parents profess the faith of the Church in which the infants are baptized. The godparents also pledge to assist the parents in their role as Christian mothers and fathers. For adult initiation, the godparents accompany the candidates at the rite of election and at the celebration of the sacraments of initiation, and they testify to the faith of the candidates or profess the faith of the Church.

²⁸ *CCC* 1255 states: “For the grace of Baptism to unfold, the parents’ help is important. So too is the role of the godfather and godmother, who must be firm believers, able and ready to help the newly baptized child or adult on the road of Christian life. Their task is a truly ecclesial function. (*Eorum munus est verum ecclesiale officium.*) The whole ecclesial community bears some responsibility for the development and safeguarding of the grace given at Baptism.”

²⁹ *Catechism of the Catholic Church*, Washington, United States Catholic Conference, 1997; *Catéchisme de l’Église catholique*, Paris, Mame/Plon, 1992.

The ongoing godparental role is similar for both infants and adults. After infant baptism, the godparents help the baptized to lead a Christian life, practice the faith, and fulfil the duties that come with baptism; they continue to witness to the faith and assist the parents in the Christian upbringing of the baptized children. They are bound by the same obligation of the parents to form their godchildren in the faith and the practice of the Christian life by their own words and deeds. Following adult initiation, the godparents help the baptized adult to persevere in the faith and in the Christian life. They assist the neophytes to remain true to their baptismal promises. The godparents of both infants and adults share a responsibility for their Christian education. As the Catechism teaches, “this is not done just as a relation or friend,” but as “representatives of a community of faith, standing as guarantees of the candidate’s faith and desire for ecclesial communion” (CCC 1255).

The law mentions nothing about the involvement of the sponsor (*patrinus*) for confirmation being involved in the preparation for that sacrament. The sponsor’s role is to participate in the liturgical rite of confirmation by bringing the candidates to receive the sacrament and presenting them to the minister for the anointing with the sacred chrism. The sponsor also has the ongoing duty to help the confirmed to fulfil faithfully their baptismal promises, to behave as a true witness of Christ, and fulfil all the duties inherent in the sacrament.

Understanding the nature and obligations of the godparental role will be important for the discussion later in this study when we identify the conditions necessary for the valid admission of a godparent. We will begin this task by a process of elimination, that is, by first identifying the conditions of c. 874 that are for liceity only before considering those that are for validity.

3 — *Conditions for Liceity Only*

Several of the conditions of c. 874 §1 may be eliminated as being for validity. Some were only for liceity in the 1917 Code and/or only for liceity in the Eastern Code. Others are not even mentioned in either the 1917 or the Eastern Code; or they are in one but not the other. If a requirement had only been for liceity in the 1917 Code or currently in the Eastern Code or did not exist in one or the other, then there would be no basis for arguing that it could possibly be for validity in the 1983 Code. Accordingly, we shall see that the requirements which are only for liceity are the minimal age, being Catholic, being confirmed and having received the Eucharist, leading a life of faith in keeping with the role to be undertaken, not being under *any* imposed or declared penalty, and having the aptitude for the role.

3.1 — Have Attained the Minimal Age

The liturgical laws require of the godparents sufficient maturity to fulfil their role;³⁰ and the law adds that “a person sixteen years of age is presumed to have the requisite maturity” (GICI 10, 2°). The standard minimal age to be a godparent is sixteen, but the Latin Code admits of exceptions. Another age may be established by the diocesan bishop;³¹ or the pastor or minister may admit someone younger than sixteen if it seems that an exception may be made for a just cause (c. 874, § 1, 2°). In the Eastern Churches, the minimal age is determined in particular law, and it is explicitly said to be only for liceity (*CCEO*, c. 685 § 2). In the 1917 Code, the minimal age of fourteen was the norm unless for a just cause it seemed otherwise to the minister; and this too was only for liceity (*CIC/17* c. 766, 1°). Clearly, the age of sixteen in the contemporary law, or any other age of particular law or custom, is only for liceity. What matters is not any precise age but the fact that the godparent has sufficient maturity to carry out the responsibilities of the *munus*.

3.2 — Be Catholic

A second condition is that the person be Catholic (c. 874 § 1, 3°). The 1917 Code required, for validity, that the godparent be baptized and not belong to any heretical or schismatic sect (*CIC/17*, c. 765 2°). The Eastern Code requires, for validity, that the godparent be Catholic, but it exceptionally allows an Eastern non-Catholic faithful to serve as godparent (*CCEO* c. 685 § 1, 2°; and § 3). The ecumenical directory also contains this exception, applicable to both the Latin and Eastern Catholic Churches *sui iuris* (*DAPNE* 98b). Now, it cannot be said that being Catholic is a constitutive requirement of the role of godparent. Otherwise, there could be no exceptions. It follows that the requirement of being Catholic is only for liceity.

3.3 — Be Confirmed and Have Received the Eucharist

A third condition is that the person to be admitted as godparent must already have been confirmed and received the holy Eucharist (c. 874 § 1, 3°). This requirement was not in the 1917 Code, so it cannot be said to be constitutive

³⁰ Rite of Confirmation 6a; General Introduction to Christian Initiation 10, 2°.

³¹ The bishop would “establish” (*statuere*) a different age by means of a general decree. The age ought not be higher than sixteen, since there is a presumption of (universal) law that a person of sixteen years of age has the requisite maturity. Particular law cannot negate this presumption by inflexibly insisting on a higher age (cf. c. 135 § 2).

of the *munus* of godparent. Thus, the requirement that the godparent must have received confirmation and the Eucharist is only for liceity. Reception of these sacraments is required for validity in the Eastern Code (c. 685 § 1, 1°), which is hardly surprising considering that the three sacraments of initiation are conferred together in the Eastern Churches, whether for adult or infant initiation. The separation of confirmation and Eucharist from infant baptism is an historical anomaly of the Latin Church (cf. cc. 889 § 2, 914).

3.4 — Lead a Fitting Life of Faith

A fourth condition is that the person should lead a life of faith in keeping with the role to be undertaken (c. 874 § 1, 3°). In the Eastern Code, this requirement is explicitly said to be for liceity (*CCEO* c. 685 § 2). The 1917 Code did not have this exact requirement but said that, for liceity, the one to be admitted as godparent should know the rudiments of the faith (*CIC/17* c. 766, 3°). Accordingly, it cannot be said that it is constitutive to the role of godparent that the person should lead a life of faith in keeping with the role to be undertaken. Thus, this condition is for liceity only. In pastoral practice, it is frequently quite difficult for the pastor of souls to evaluate whether a person unknown to him, who is designated to be godparent, leads a life of faith in keeping with the role to be undertaken. To overcome this problem, the pastor or minister might place the onus on the parents or adult candidate to designate only someone they know who meets this condition. If they do not know anyone so qualified, it falls to the pastor or minister to choose a godparent “insofar as possible” (c. 872).

3.5 — Not Be under Any Imposed or Declared Penalty

A fifth condition is that the one to be admitted as godparent not be under any imposed or declared penalty (c. 874 § 1, 4°). The Eastern Code requires, for validity, that the person not be bound by penalty of excommunication, even a minor one, or by suspension, deposition, or privation of the right of fulfilling the role of godparent (*CCEO* c. 685, 6°). This Eastern norm is an incapacitating law in the sense of *CCEO* c. 1495 (*CIC* c. 10). The 1917 Code contained a similar norm, rendering incapable of being a godparent anyone under a condemnatory sentence or declaration of excommunication or who is infamous by infamy of law³² or is excluded from legitimate acts,³³ or who is a deposed or

³² For those infamous by infamy of law, see *CIC17* cc. 2314 §§ 1, 2, 3; 2320; 2328; 2343 § 1, 2° and § 2, 2°; 2351 § 2; 2356; and 2357 § 1.

³³ For those excluded from legitimate acts, see *CIC17* cc. 2294; 2315; 2350 § 2; 2263; 2353; 2354 § 1; 2385. The legitimate acts in question were specified in *CIC17* c. 2256, 2°.

a degraded cleric (*CIC* c. 765, 2°). In the Latin Code of 1983, there is also such an express statement of validity, but it is found in Book VI on penal law (discussed below), not in c. 874, and it pertains only to the penalty of excommunication that has been imposed or declared. In keeping with the principle of strict interpretation of penal law (c. 18), the condition of c. 874 § 1, 4°—that the one to be admitted as godparent not be under an imposed or a declared penalty—applies for validity only to the penalty of excommunication. If a person designated to be godparent is bound by any other imposed or declared penalty, he or she is validly but illicitly admitted to the role.

3.6 — Have the Aptitude for the Role

A sixth condition is that the person have the aptitude (*aptitudo*) for fulfilling the role of godparent (c. 874 § 1, 1°). This condition is found neither in the 1917 Code nor in the Eastern Code. *Aptitudo* in this context is a quite general and even vague notion. It has more the character of an exhortation than a precise legal requirement. In the English versions of the Code, it is translated as “suitability,” but this in an interpretation not consistently found in other language translations.³⁴ To be sure, the judgement about aptitude, like the judgement about a life of faith in keeping with the role to be undertaken, is at times somewhat subjective, and different authorities may come to different conclusions in a particular case. If the pastor, for example, judges someone inapt or unsuitable but the designated person nevertheless fulfils all the other conditions of the law, the parents or adult candidate may seek a second judgement from the local ordinary. Doubtful cases should be resolved in favour of admitting the person to the *munus*.

4 — The Valid Admission of Godparents in Light of c. 124 § 1

Canon 874 begins: “That anyone may be admitted (*ut admittatur*) to undertake the role (*munus*) of godparent, it is necessary (*oportet*) ...,” and there follow a number of requirements. In the preceding part of this study, we identified which of these requirements to be a godparent for baptism or confirmation are only for liceity. Since the canon is not an invalidating or

³⁴ Some other translations are *les aptitudes* (French = aptitude, disposition), *capacidad* (Spanish = capacity), *geeignet sein* (German = be suitable), and *attitudine* (Italian = aptitude, ability).

incapacitating law, each requirement must be understood as being only for liceity unless there is some other basis for validity as discussed in Part One above, or if there is an incapacitating law apart from this canon. In this regard, c. 124 § 1 is key, as it establishes three conditions for the validity of a juridical act, namely, that (1) the act be placed by a capable person; (2) there exist those things which essentially constitute the act itself; and (3) any formalities or requirements imposed by law for the validity of the act be observed.³⁵ Since the third category is not germane to our topic, we shall address the question in two sections, first considering the constitutive elements of becoming a godparent and then determining the capable person for valid admission as godparent.

4.1 — Essential Elements

Undertaking the lifelong role of godparent involves a complexity of four distinct acts. The first three are juridical acts: the designation of the godparent, the acceptance of this role by the designated person, and the admission of the godparent by the pastor of souls or his delegate. These three acts are required to function as godparent during the phase of preparation for the sacraments, but they do not suffice to establish the ongoing spiritual relationship of godparent and godchild. For the three juridical acts to achieve their final effect, a liturgical act is necessary, namely, the celebration of the baptism or confirmation. Each of these four acts is an essential element that must be observed for one to become a godparent on a permanent basis. We shall first discuss the three juridical acts and then the liturgical act that completes them.

4.1.1 — *Designation*

Canon 874 § 1, 1° first addresses the designation of the godparents. It says that the godparent is to be designated by the one to be baptized, or by the parents or those who take their place or, lacking these, by the pastor or the

³⁵ Canon 124 — § 1. *Ad validitatem actus iuridici requiritur ut a persona habili sit positus, atque in eodem adsint quae actum ipsum essentialiter constituunt, necnon sollemnia et requisiti iure ad validitatem actus imposita.*

On the significance of this canon, Helmuth Pree states: “Within the legal system of the Church as a whole, canon 124 is a basic legal norm with a remarkable significance for systematization; it provides the same lines and standards for all kinds of juridic acts. Thus, it is implicitly a principle of interpretation (and for filling up gaps in the law) in regard to any kind of legal act. The relevance of this fact cannot be overstated, in that the institution of the juridic act runs like a thread through all parts of the legal system of the Church.” See PREE, “Juridic Acts and Liability in Canon Law,” 57.

minister. No one can unilaterally assume the role of godparent without a prior, lawful designation. This designation is necessary for validity since it is an essential element of the complexity of acts necessary to be a godparent.

The capable persons for designating the godparent are only those mentioned explicitly in the law. For the baptism of an adult (those with the use of reason), the candidates themselves designate their godparent.³⁶ For infant baptism, one or both parents or those who take their place, such as a legal guardian, designate the godparent. Adoptive parents are equivalent in law to natural parents (cf. c. 110). The designation of the godparent by the parents or the one who takes their place is a private juridical act. If the godparent is not designated by one of these, it falls to the pastor or minister of baptism or confirmation to designate the godparent insofar as this can be done (cf. c. 872 = *quantum fieri potest*). Designation of the godparent by the pastor or minister is a public juridical act; either acts *nomine Ecclesiae* in designating the godparent. Designation by the pastor or minister is a singular administrative act that makes a provision (cf. c. 48), whether given orally or in writing, and the power to place this act may be delegated.³⁷ No one apart from those mentioned, however, may validly designate a godparent, not even the local ordinary, since the law assigns this competence to the pastor or minister. Laws establishing the competence for public acts are constitutive and therefore do not need to be stated expressly in the law as being for validity.³⁸

There are no requirements or formalities for designating a godparent, but it must be express. Typically, designation is done orally by inviting a person to be godparent and then notifying the pastor or his delegate of the choice of godparent. A tacit designation is not valid, for example, the grandmother asking someone to be godparent against the wishes of the mother, but the mother does not voice her objection out of reverential fear. If, however, the mother would not express her objection to the choice of godparent before the baptism, the presence of the grandmother's selection at the baptism, acting

³⁶ As discussed in Part Two above, the RCIA says that the candidates choose the godparents who are delegated by the Christian community and approved by the priest, but this delegation by the community is not observed in many places.

³⁷ It would be rare that the minister of the sacrament would delegate the power to designate a godparent, but cases are conceivable. For example, an adult to be baptized does not know anyone who could be godparent, so the parochial vicar, who is to celebrate the sacraments of initiation, delegates the director of the RCIA to designate a catechist who is willing to undertake this responsibility.

³⁸ According to Willy Onclin, "Leges itaque quibus confertur competentia sunt revera iuris constitutivae." He goes on to say that the rule of c. 11 (c. 10 in the 1983 Code) on incapacitating laws is not applicable to laws regulating competence. See ONCLIN, "De requisitis ad actus iuridici existentiam et validitatem," 406.

in the role of godparent, would indicate an implicit designation by the mother, and such designation would be presumed valid until proven otherwise (c. 124 § 2).

4.1.2 — *Acceptance*

The second juridical act involved in becoming a godparent is the acceptance by the one designated to take on this role. This acceptance is an essential element of the complexity of acts involved in becoming a godparent. Canon 874 § 1, 1° does not use the word “acceptance” but says that the one designated must have the intention of fulfilling this role (= *oportet intentionem habeat hoc munus gerendi*). The intention to place the act is the essence of every juridical act. The intention is necessary for validity in virtue of the divine natural law. No one can be compelled to accept the responsibility of becoming a godparent (cf. c. 125 § 1). Having the intention to fulfil the role also demands correct knowledge about the substantial nature of the godparental role, as discussed below (section 4.2.1).

No formal declaration is required by law to manifest this intention, but it must be expressed in some way in the external forum, for example, explicitly by verbalizing acceptance of the parent’s request to be godparent or implicitly by participating in the baptismal rite in the role of godparent after designation by the parent. If the acceptance to be godparent is not manifested, the internal intention to take on this role has no juridical relevance.³⁹ In general, silence has no juridical effect,⁴⁰ unless the law exceptionally acknowledges some effect.⁴¹

4.1.3 — *Admission*

The third juridical act is the admission of the godparent by the competent authority. This admission is an essential element of becoming a godparent and is thus required for validity. Canon 874 uses the word *admittere*, but it not does say who is the capable person (the competent authority to admit). While

³⁹ For example, the person invited to become godfather says that he will consider the invitation. Meanwhile, the mother is pressed by the pastor to give the name of the godfather, and she indicates the man she had invited. If he is not later involved in the ceremony as godparent, there is no express manifestation of his acceptance.

⁴⁰ “Intentio mente retenta nihil in humanis contractibus operatur” (D 19, 2, 60).” See Javier DE AYALA, “Silencio y manifestación de voluntad en Derecho Canónico,” in *IC*, 1 (1961), 78-84; and PREE, “On Juridic Acts and Liability in Canon Law,” 53-54.

⁴¹ For example, cc. 57 § 2, 165, 197-199, 1630 § 1, and 1635; and *CCEO* cc. 947 § 1, 1311 § 1, 1316, 1507 § 4, 1518, and 1540-1542.

including this fact in the Code would be useful, it is not strictly necessary, as the competent authority is identified in the liturgical laws (cf. c. 2). It was noted above in Part Two that the RCIA says that “the priest” must approve the choice of godparent (*OICA* 43, *RCIA* 10). This priest who approves the godparent is specified further in the General Introduction to Christian Initiation, no. 10, which says that this judgement belongs to the pastor of souls (*de iudicio animarum pastoris*). The “pastor of souls” in this context refers to the parish pastor, parochial vicar, chaplain with the full care of souls, or the local ordinary.⁴² The admission by the pastor of souls must be express, whether explicit or implicit. An explicit admission may be given orally or in writing (e.g., by a notation in the baptismal file). The admission may also be implicit; for example, the pastor, who only knows second-hand that the godfather is to be the uncle of the child, assigns the parish deacon to celebrate the baptism. The admitting authority thus must know the identity of the one designated either by name or relationship or by some other identifying basis, and he must perform some act in the external forum positively demonstrating this admission (by celebrating the baptism, assigning another for it, recording the name of godparent, etc).

The admission to the role of godparent is a singular administrative act, an act of executive power, so the pastor or other competent authority can freely delegate the faculty to admit godparents to others, whether by general or special delegation (c. 137). For example, the faculty to admit godparents may be delegated to a parish deacon or to someone who is responsible for a parish without a pastor (c. 517 § 2). The delegation may be implicit, for example, by the pastor appointing the parish deacon to be in charge of the preparations for infant baptism, which would implicitly include the admission of godparents unless the pastor expressly reserved that power to himself or another. Without at least an implicit delegation, the admission would be invalid.

The competent authority may admit any qualified person for a baptism / confirmation that is to be celebrated in his territory, e.g., the pastor for the territory of the parish, the vicar general for the territory of the diocese, etc. He may also admit as godparent one who is his subject even if the baptism is to be celebrated outside his territory (cf. c. 136). For example, the pastor of the one designated as godmother may admit her and then notify the pastor of the place of baptism of the admission. Also, the local ordinary may admit a godparent despite the refusal of the pastor to do so. This requires no formal recourse since the local ordinary is equally competent to admit.

⁴² Instead of “pastor of souls,” the English version of the liturgical law translates *pastor animarum* as “the parish priest (pastor).” This is not a correct interpretation of the law, as the Latin word for the parish priest, or pastor of a parish, is *parrochus*.

4.1.4 — *The baptism or confirmation of the godchild*

Following the admission, the lifelong godparental role is acquired by means of the valid baptism or confirmation of the godchild. The godparent does not have to be physically present at the liturgy, but the baptism / confirmation must be celebrated, or the ongoing godparental role is not established. If the three juridical acts of designation, acceptance, and admission are all valid, the celebration of baptism or confirmation establishes the godparental role on a permanent basis. It is similar in this respect to other roles in the Church that are acquired liturgically following a juridical act, such as by the sacrament of *holy orders* following admission to the order (c. 1036); or by certain sacramentals: a constitutive *blessing* following election of an abbot or abbess,⁴³ a *consecration* following admission to a life of virginity,⁴⁴ or an *institution* following an admission to the ministries of lector or acolyte.⁴⁵

Upon valid baptism or confirmation, a spiritual relationship arises between godparent and godchild. “With baptism being a new birth to the life of grace, the baptized becomes in a certain manner the spiritual child of the one who, by the sacrament, has engendered this life.... [The godparents’] participation in this spiritual generation makes them the spiritual parents of their godchild.”⁴⁶ This relationship in the law of the Latin Church *sui iuris* does not anymore bring about an impediment to marriage (cf. *CIC/17*, cc. 768, 1079), as it still does in the law of the Eastern Churches (*CCEO*, c. 811). Nevertheless, it is fittingly called a “spiritual relationship,” not only to distinguish it from the blood or legal relationship (cf. c. 110) between parent and child but also to stress the ecclesial nature of this *munus*, that it pertains to the spiritual order and entails obligations of religion.⁴⁷

⁴³ *Ordo benedictionis Abbatis et Abbatissae*, editio typica, 9 November 1970, Typis Polyglottis Vaticanis, 1970.

⁴⁴ *Ordo consecrationis virginum*, editio typica, 31 May 1970, Typis Polyglottis Vaticanis, 1970.

⁴⁵ *De institutione Lectorum et Acolytorum, de admissione inter candidatos ad Diaconatum et Presbyteratum, de sacro caelibatu amplectendo*, editio typica, 3 December 1972, Typis Polyglottis Vaticanis, 1972.

⁴⁶ Pierre TORQUEBAU, “Baptême en Occident,” in *DDC*, vol. 2, col. 161. Translation is mine, adapted for inclusivity.

⁴⁷ The relationship may also be important culturally. In the Hispanic culture, there is “a family relationship between padrino/madrina [and] godchild and with the compadres (parents of the child). It is a relationship that has certain rights and obligations attached to it. It extends for life. In many cases it means providing for the welfare of the child as he/she grow to adulthood.” Arturo PEREZ, “Hispanic Traditions of Padrinos and Madrinas,” in James A. WILDE (ed.), *Finding and Forming Sponsors and Godparents*, Chicago, Liturgy Training Publications, 1988, 59.

4.2 — The Capable Person

Only a capable person may validly be admitted as godparent, but c. 874 § 1—on the qualifications to be godparent—is not an incapacitating (disqualifying) law in the sense of c. 10. Canon 874 § 1 mentions a number of conditions for admission to the role of godparent. Two of these were treated above as essential elements: the juridical acts of designation and acceptance, both necessary for validity. The task before us now is to determine which of the other conditions are for validity. Only these latter pertain to the capable person (*persona habilis*) of c. 124 § 1, namely, a person who is capable of being validly admitted to the role of godparent. In section 4.1 above, the four essential elements of becoming a godparent were identified: designation, acceptance, admission, and the sacramental celebration. All of these are necessary to establish validly the ongoing godparental *munus*. There are also several other qualifications for validity found explicitly or implicitly in c. 874 and in Book VI of the Code. Accordingly, to be validly admitted as godparent, a person must additionally (1) be baptized; (2) not be the father or the mother of the one to be baptized; (3) have sufficient use of reason and sufficient knowledge; and (4) not be bound by the penalty of excommunication that was imposed or declared. We shall look at each of these in turn.

4.2.1 — *Be baptized*

The 1917 Code required, for validity, that the godparent be baptized. Baptism is likewise a requirement for validity in the Eastern Code (*CCEO* c. 685 § 1, 1°). In the Latin Code, it is implicit that the godparents must be baptized in that they must be Catholic and must have received the sacraments of confirmation and the Eucharist. We have seen above, however, that these latter are requirements only for liceity. Nevertheless, baptism is a requirement for validity also in the Latin Church under the 1983 Code, not because this is expressly stated in the law, but because it is a constitutive qualification to be a godparent. This is evident from an examination of the nature, role, and obligations of godparent as seen in the juridical and magisterial sources examined above in Part Two.

It was seen there that the godparents represent the ecclesial community, which is impossible if the godparent is not baptized oneself and part of that faith community. During the catechumenate, the godparents testify to the faith and character of the adult candidates and bear witness to the Christian life. Now, a person cannot witness to the Christian life unless a Christian oneself. During the celebration of the rites of both infant baptism and adult initiation, the godparents together with the parents are called upon to profess

the faith of the Church. Surely, one cannot profess the faith of the Church if one does not share the faith of the Church through baptism. This is affirmed by the Catechism, which clearly indicates that baptism is constitutive of the role of godparent in saying that godparents “must be firm believers, able and ready to help the newly baptized child or adult on the road of Christian life” (CCC 1255).

After infant baptism, the godparents continue to witness to the faith and assist the parents in the Christian upbringing of the baptized children. They are bound by the same obligation of the parents to form their godchildren in the faith and the practice of the Christian life by their own words and deeds. The godparents of both infants and adults share a responsibility for their Christian education. The sponsors for confirmation likewise must help the confirmed to fulfil faithfully their baptismal promises. These obligations demand that the godparent be baptized, subject to the divine positive law reflected in the words of Christ’s command to spread his teachings and make disciples of all peoples (Mt 28:18-20). This command is not only binding on Catholics but on all Christians, that is, all who are validly baptized.⁴⁸

It is by baptism that one is constituted a person in the Church with the duties and rights proper to Christians (cf. c. 96), including the right and duty to participate in the priestly, prophetic, and kingly offices of Christ and to exercise the Church’s mission (c. 204 § 1). An unbaptized person cannot be a person *in the Church* and cannot share in its mission, and so is radically and ontologically incapable of being a godparent.

4.2.2 — *Not be the father or mother*

The father and mother are the natural or legal parents of the one being baptized whereas the godfather and godmother are the spiritual parents.⁴⁹ The godparents cannot validly be the father or mother of the one being baptized, whether as an infant or adult, nor can they validly serve as the sponsor for their child at confirmation. The parental and godparental roles are fundamentally distinct, be it during the preparation for infant baptism or adult catechumenate, during the liturgical rites, and in the lifelong spiritual relationship after baptism and confirmation. The godparents serve in an auxiliary role to

⁴⁸ Frederick R. McMANUS states: “It is clear that a person who has not been initiated as a Christian cannot appropriately fulfill such responsibilities as testifying to the community about a catechumen’s faith and goodness of life or of undertaking, in the case of a child, the role of assisting in Catholic upbringing.” In *CLSA Comm1*, 630.

⁴⁹ See note 46 above.

the parents. They assist the parents in the education of their godchild.⁵⁰ For adult initiation, the godparent represents the Christian community and assists the catechumen. According to c. 872, the godparent is to accompany (*adstare*) the adult candidate in Christian initiation and, for infant baptism, together with the parents, to present the infant for baptism and to help the baptized child to lead a Christian life congruent with baptism and faithfully fulfil the obligations inherent in it. The sponsor for confirmation also serves in an auxiliary role with the principal duty of helping the confirmed to fulfil faithfully their baptismal promises. While parents may present their children to the minister of confirmation, they cannot actually be the sponsors. Since it is impossible for one person to be a parent and godparent at the same time, there is no need for the law expressly to state this. Being distinct from the parent is essentially constitutive of the juridical institute of godparent. It is a constitutive law and thus cannot be dispensed by anyone (c. 86).⁵¹

4.2.3 — *Sufficient use of reason and knowledge*

Above it was noted that the liturgical laws require of godparents sufficient maturity to fulfil their role (section 3.1). This implies the need for sufficient use of reason and sufficient knowledge, which need is also implicit in the requirement that the one designated as godparent have the intention of fulfilling the *munus* (c. 874 § 1, 1°; *CCEO* c. 685 § 1, 3°). The use of reason was an explicit requirement for validity in the 1917 Code (*CIC/17* c. 765, 1°). There was no need to repeat this explicitly in the 1983 Code or the Eastern Code, as the use of reason is required by the divine natural law to place any juridical act, including the act of acceptance to be godparent.

In addition, the use of reason must be *sufficient* to be capable of understanding the nature of the role of godparent and the obligations connected with it. This also requires sufficient knowledge to understand the substance of the act (c. 126). The substance of an act is an essential element of the act, its essential

⁵⁰ Kevin T. HART states: “The parents are primarily responsible for raising the child in the faith. The godparents’ role is simply to assist them. However, the role of the sponsor becomes more critical when the parents fail in the responsibility. Thus, the canon [874] clearly distinguishes between the role of parent and that of godparent.” In *CLSA Comm2*, 1063.

⁵¹ See John M. HUELS, “Constitutive Law and Juridic Institutes,” in *IE*, 16 (2004), 711-739. Evidence exists that, at the time of St. Augustine, parents could function at baptism in the same way as godparents. See KEARNEY, *Sponsors at Baptism*, 30-31. However, our conclusion that parents, by constitutive law, may not function as godparents, is based on the modern law, not on ancient custom.

nature, or its essential objects.⁵² One cannot validly accept to be godparent, or place any other juridical act, if one does not know the substance of what that act entails.⁵³ For example, if a woman believes that a godmother is just an honorary witness to baptism, or that the godparental role ends with the celebration of baptism, she cannot validly accept the role of godmother,⁵⁴ because her mistaken idea amounts to substantial error (c. 126), going to the substance of what it means to be a godparent. Or, if a man is ignorant of the fact that he is taking on an ongoing responsibility as a godfather, he cannot validly accept the *munus*, as there must be some minimal knowledge that this role is a position of responsibility and not merely honorific or ceremonial. Substantial ignorance or error renders a person incapable of validly accepting the role of godparent, as one cannot intend to fulfil the role if one does not correctly understand the substance of what one is intending.⁵⁵

4.2.4 — *Not be excommunicated*

It was noted above (section 3.5) that one of the qualifications to be a godparent is not being bound by any canonical penalty legitimately imposed or declared (c. 874 § 1, 4°), and we saw that this only applies to liceity except for the penalty of excommunication. According to c. 1331 § 2, 4°, one of the effects of the penalty of excommunication that has been imposed or declared is that the excommunicate “cannot validly obtain a dignity, office, or other position (*munus*) in the Church.”⁵⁶ The godparental role is repeatedly called a *munus* in canon law and is rightfully included in the application of this penal law.⁵⁷ Canon 1331 § 2, 4° is an incapacitating law (c. 10) since it

⁵² Helmuth PREE, commentary on c. 126 in Klaus LÜDICKE et al. (eds.), *Münsterischer Kommentar zum Codex Iuris Canonici*, Essen, Ludgerus, 1986-, at 126/3.

⁵³ According to Pree, the intention to place a juridical act “consists of cognition and the intention itself. Cognition requires at least the knowledge of the essence of the juridic act, to know the persons involved, and the essential content of the legal act.” PREE, “On Juridic Acts and Liability in Canon Law,” 53.

⁵⁴ See Franz Xavier WERNZ, *Ius Decretalium ad usum praelectionum in scholis textus canonici sive iuris Decretalium*, Prati, Giachetti, 1908-1915, vol. 4, 492.

⁵⁵ See Richard Joseph KEARNEY, *Sponsors at Baptism according to the Code of Canon Law*, Canon Law Studies 30, Washington, Catholic University of America, 1925, 79-80.

⁵⁶ “Quod si excommunicatio irrogata vel declarata sit, reus ... nequit valide consequi dignitatem officium aliudve munus in Ecclesia.”

⁵⁷ Canon 1331 § 1, 3°, which is only for liceity, prohibits an excommunicate from functioning in any ecclesiastical offices or ministries or functions (*munera*). This applies only to ecclesiastical (public) *munera* by which a duly deputed person acts in the name of the Church. This is not the case of a godparent who, once the liturgical rites of initiation are completed, acts in his or her own name.

explicitly states that it is for validity, rendering the excommunicate incapable of being designated, accepting, or being admitted to the role. In fact, this is the only incapacitating law in the Latin Code with reference to the godparent, since c. 874 § 1 itself is not an invalidating or incapacitating law.

Conclusion

The principal aim of this study has been to determine what is required by law for the valid admission of a person to the *munus* of godparent. Since c. 874 is not an invalidating or incapacitating law (c. 10), our analysis has relied on the general norm of c. 124 § 1 regarding the essential elements of a juridical act and the person capable of validly acting. Whereas invalid and ineffective acts (textual nullity) are governed by the rule of c. 10 on invalidating and incapacitating laws, inexistent acts (virtual nullity) are not explicitly recognised in the law but are implied in c. 124 § 1. If a person is incapable of acting or is incompetent to act, or if an essential element of an act is lacking, it is unnecessary for the law expressly to state that the attempted act is invalid, because there is no semblance of an act in the legal sense.

In light of c. 124 § 1, we have concluded that there are eight conditions for the valid admission of a godparent. Four of these pertain to the person who is capable of being validly admitted. Such a person must be baptized; not be the mother or father; have sufficient use of reason and sufficient knowledge to assume the role, which are necessary to have the intention of fulfilling the role; and not be under the penalty of excommunication that has been imposed or declared. Additionally, there are four essential elements involved in becoming a godparent, each of which is necessary for validity. Three of these are juridical acts: the designation of the godparent by the parents of the infant or the adult candidate or, if this has not been done, by the pastor or minister; the acceptance of the role by the one so designated, which is the external manifestation of the intention to fulfil the role; and admission to the role by the pastor of souls, namely, by the pastor (*parrochus*), parochial vicar, chaplain with the full care of souls, or the local ordinary. The final essential element is a liturgical act, the celebration of the sacrament of baptism or confirmation. If the sacrament is not celebrated, the valid designation, acceptance, and admission do not achieve their final effect, and the lifelong spiritual relationship between godparent and godchild is not established.

Of these eight conditions for validity, all but one are explicitly or implicitly contained in c. 874 and the liturgical laws. These are: being baptized (implicit); not being the mother or father (explicit); having sufficient

use of reason and sufficient knowledge (implicit); the designation of the godparent (explicit); the acceptance of the role (implicit), which externalizes the intention of fulfilling it (explicit); the admission to the role by the pastor of souls (explicit); and the celebration of the baptism or confirmation (implicit). The final condition for a person to be capable of valid admission to the role of godparent is not being under the penalty of excommunication that has been imposed or declared (c. 1331 §2, 4°). This latter is not in c. 874 but in Book VI of the Code. In fact, it is the only incapacitating law (c. 10) with respect to the qualifications for godparents, because the canon explicitly says that such an excommunicated person *cannot validly obtain* any dignity, office, or other position (*munus*) in the Church.

There are six other conditions in c. 874 which do not pertain to the person capable, or the constitutive elements, of validly becoming a godparent. Since the canon is not an incapacitating law and there is no other basis for asserting that any of the six conditions is for validity, we have to conclude that they all are only for liceity. These six are the minimal age, being Catholic, being confirmed and having received the Eucharist, leading a life of faith in keeping with the role to be undertaken, not being under *any* imposed or declared penalty, and having the aptitude (or suitability) for the role.

Despite the fact that the relationship between godparent and godchild is no longer an impediment to marriage in the Latin Church, as it still is in the Eastern Churches *sui iuris*, it is nevertheless fittingly called a “spiritual relationship.” It is an ongoing relationship involving lifelong obligations that are supportive of the obligations of the parents, especially by witnessing to the faith and ensuring the catechetical formation of the neophyte. Given the ecclesial importance of this *munus*, the faithful observance of the requirements laid down in canon law for admission to it, both those for validity as well as for liceity, helps to ensure that the godchild will have a capable and conscientious godparent.

AMOR CONIUGALIS IN ROTAL JURISPRUDENCE

ALEXANDER M. LASCHUK

SUMMARY — *Amor coniugalis* is referred to frequently in the sentences of the Roman Rota. This phrase, which does not appear in the *Code of Canon Law*, reflects the teachings of the Second Vatican Council, especially the pastoral constitution *Gaudium et spes*. The paper first examines the term *amor coniugalis* in conciliar and post-conciliar teaching. In the second section, it examines how this phrase has been taken up in recent rotal sentences, especially following the 2007 rotal allocution of Pope Benedict XVI. Finally, the observed citations are synthesized to identify the concept of *amor coniugalis* and its relevance to matrimonial consent.

RÉSUMÉ — On réfère souvent à l'*amor coniugalis* dans les sentences de la Rote romaine. Cette expression, qui n'apparaît pas dans le *Code de droit canonique*, reflète les enseignements du deuxième Concile du Vatican, spécialement la constitution pastorale *Gaudium et spes*. En premier lieu, cet article examine l'articulation de l'expression « *amor coniugalis* » dans l'enseignement conciliaire et post-conciliaire. La deuxième section considère comment cette phrase a été reprise dans les sentences rotales, spécialement suivant l'allocution rotale du pape Benoît XVI en 2007. Finalement, les citations observées sont synthétisées afin d'identifier le concept d'*amor coniugalis* et son rapport au consentement matrimonial.

Introduction

Amor coniugalis (conjugal love) is listed frequently in the recent indexes of the *Decisiones* of the Roman Rota, alongside key phrases related to grounds of nullity, such as *bonum prolis*, *bonum fidei*, and *bonum sacramenti*. What makes the phrase *amor coniugalis* so important? What is its meaning? Descriptions of *amor coniugalis* in conciliar and post-conciliar teaching will be first examined. Second, there will be a review of recent published rotal decisions to see the impact of conciliar teaching upon the jurisprudence of the Rota. Finally, some general conclusions will be made

related to the nature of *amor coniugal*, along with an identification of the role of the rotal auditors in articulating a theology of marriage in response to a call of the Roman Pontiff.

1 — *Descriptions of amor coniugal*

Amor coniugal is not a new phrase. In fact, John Owen, the sixteenth century Welsh Congregationalist lawyer and writer, even wrote a poem by the name.¹ However, as a theological concept, *amor coniugal* is articulated most definitively in the Pastoral Constitution on the Church in the Modern World, *Gaudium et spes*, where it appears thirteen times. First, this document will be examined to see how *amor coniugal* is a central point of the conciliar teaching on marriage. Second, post-conciliar magisterial documents will be examined to greater illustrate the nature of *amor coniugal*, namely *Humanae vitae* and *Familiaris consortio*.

1.1 — The Pastoral Constitution *Gaudium et spes*

Gaudium et spes refers to marriage as an *intima communio vitae et amoris coniugal* (an intimate communion of life and love).² In Flannery's translation, the English expressions used include "married love" (no. 48) and "conjugal love" (no. 49).³ According to GS 48, this love has been established by the Creator and is made in the irrevocable consent manifested by the parties. Conjugal love is ordered to the procreation and education of children. Conjugal love is what makes the parties no longer two, but one flesh for mutual assistance in an unbreakable union. It is a reflection of Divine Love and is made great by supernatural means, which gives the relationship of the beloved healing, perfection, grace, and charity. The Divine Love mingles with the human love and leads the spouses to a "free and

¹ John OWEN, "Amor Coniugal," in *Epigramatum*, book ten, Mainz, Typis Nicolai Heyll, 1649, 152.

² SECOND VATICAN COUNCIL, Pastoral Constitution on the Church in the Modern World *Gaudium et spes*, 7 December 1965, in AAS, 58 (1966), 1025-1115, no. 48 (= GS). English translations of citations from the Second Vatican Council, unless otherwise indicated, are taken from Norman P. TANNER (ed.), *Decrees of the Ecumenical Councils*, vol. 2, Washington, Georgetown University Press, 1990.

³ Austen FLANNERY (gen. ed.), *Vatican Council II: The Conciliar and Post-Conciliar Documents*, vol. 1, new rev. ed., Northport, NY, Costello Pub. Co., 1996, 903-1001. Tanner is more consistent in translating the phrase as "married love."

mutual self-giving, shown in tender feelings and actions, and permeates the whole of their lives, being itself also perfected and increased by its own generosity” (no. 49).

Gaudium es spes, no. 49 especially focuses on *amor coniugalis*. Conjugal love is an aid for the strengthening of one’s marriage. This love is directed from one person to another through the will, involving the entire person, and is the sign of the friendship of marriage. It is permanent, unlike erotic love, which fades. This conjugal love is noble and worthy when it is united intimately and chastely in an action that is a mutually self-giving, joyous, and expressed in a truly human manner (*modo vere humano exerciti*). Conjugal love is sealed by mutual fidelity and hallowed above all by the sacrament of matrimony, remaining steadfast through difficult times. Adultery and divorce do not profane conjugal love. It is firmly established by the Lord and shows the equal dignity of husband and wife. It is above all the calling of the Christian couple, who by their witness show the public how this is a highly prized form of love that brings about cultural, psychological, and social renewal. It is something for which there should be remote instruction, so that young people can be prepared for the duty and work of this love, something they can enter into after completing what the Council calls an “honourable engagement.”

GS 50 continues and instructs that conjugal love is ordained towards the *bonum prolis*. Thus, conjugal love has its ultimate purpose the growth of the family through cooperation with the love of God. Conjugal love is protected by the law of God, which requires the couple to respect the Church’s teaching on the regulation of birth and openness to acts *in se* capable of procreation. In GS 51, the Council teaches that a contradiction cannot exist between the divine law concerning the transmission of life and the true nature of conjugal love. The acts proper to conjugal love are to be exercised properly and honoured with reverence, while being evaluated according to objective standards.

1.2 — Papal Teachings

Paul VI recognized the novelty of the conciliar teaching, and in *Humanae vitae* he described the value of conjugal love and its relationship to intimacy as “a new understanding of marriage.”⁴ Given the centrality of *amor coniugalis* to the conciliar teaching on marriage, conjugal love began to be studied for its

⁴ PAUL VI, Encyclical letter on the regulation of birth *Humanae vitae*, no. 2, in AAS, 60 (1968), 482. English translation *Humanae vitae: Encyclical Letter of His Holiness Pope Paul VI on the Regulation of Births*, San Francisco, Ignatius Press, 1998.

juridical relevance.⁵ Conjugal love was distinguished from fornicative love, adulterative love, concubinative love, onastic love, and homosexual love.⁶ It has four central aspects: i) availability for sexual relationships by means of the exclusive use of the *ius in corpus*, ii) the presence of the minimal marital affection to have sexual relations *in humano modo*, iii) the intentionality of cohabitation and mutual help to establish sexual relations, and iv) an intentionality of permanence and exclusivity of this love.⁷

This centrality of *amor coniugalis* as a description for Christian marriage was amplified in Pope John Paul II's post-synodal apostolic exhortation *Familiaris consortio*. In this document, the relationship between conjugal love and "responsible fertility" is emphasized.⁸ The pope calls the admission of contraception into a relationship a "falsification of the inner truth of conjugal love" (no. 32). *Amor coniugalis* is such a central theme to the modern teaching on marriage that John Paul II defines marriage as a "covenant of conjugal love." Indeed, conjugal love requires marriage, as this is a public expression of a unique and exclusive relationship between the parties (no. 11). Authentic conjugal love presumes the equality of the spouses and requires the man to treat his wife with dignity (no. 25). Conjugal love is a concrete manifestation of God's love for humanity. To this end, abandoning conjugal love through adultery or other sin reflects an abandonment of the love of God (no. 12). Conjugal love is directed towards conjugal charity, whereby the parties express the love of the Cross in the context of their own intimate relationship (no. 13). This love requires a totality of the persons and is permanent as a result (no. 20). It is directed towards the procreation of children but especially their education in the handing over of the faith (no. 28).

2 — *Amor coniugalis in Recent Rotal Jurisprudence*

Amor coniugalis is clearly a central focus in the conciliar and post-conciliar understanding of marriage. It is not surprising that it would later begin

⁵ See, for example, Urbano NAVARRETE, *Strutura iuridica matrimonii secundum concilium Vaticanum II, Momentum iuridicum amoris coniugalis*, Rome, Gregorian University Press, 1968.

⁶ León DEL AMO PACHÓN, "El amor coniugal, y la nulidad del matrimonio en la jurisprudencia," in *IC*, 17 (1977), 90.

⁷ Rafael L. CIFUENTES, "A relevância jurídica do amor conjugal," in *IC*, 30 (1990), 261.

⁸ JOHN PAUL II, Apostolic exhortation on the role of the Christian Family in the Modern World *Familiaris consortio*, 22 November 1981, no. 11, in *AAS*, 74 (1982), 92. English translation <http://w2.vatican.va/content/john-paul-ii/en/apost_exhortations/documents/hf_jp-ii_exh_19811122_familiaris-consortio.html> (July 2, 2019).

to appear in the decisions of the Roman Rota relative to the validity or nullity of a union.⁹

In recent years, the discussion of *amor coniugal* in the sentences of the Rota occurred irregularly. For example, in 2005 and 2006, only one published rotal sentence made use of the phrase *amor coniugal*: a 2005 sentence *coram* Caberletti which investigated the nullity of marriage on the ground of psychic incapacity to assume the essential obligations of marriage (c. 1095, 3^o).¹⁰ In this sentence, which was a negative decision, *amor coniugal* is described as emanating from human nature and is adorned and defined by the proper ends of marriage. There is a minimum level of *amor coniugal* required for a finding *pro vinculo*, in that it defines the *bonum coniugum*.¹¹ It pertains to the rights and obligations of marriage defined in canon 1135: "Each spouse has an equal duty and right to those things which belong to the partnership of conjugal life."¹²

In 2007, there were two published decisions of the Rota which discussed *amor coniugal*. The first of these, *coram* Monier, was a case regarding the exclusion of the *bonum fidei*.¹³ The *ternus* in this case found in the affirmative. In this decision, *amor coniugal* was seen as a synonym for fidelity, which is an essential element of marriage.¹⁴ The second of these decisions, *coram* Defilippi, was a negative decision on the ground of simulation of the *bonum sacramenti*.¹⁵ This decision uses *amor coniugal* to describe the *bonum sacramenti*, indicating that conjugal love is, by its nature, unitive and indissoluble.¹⁶

In 2008, the auditors of the Roman Rota used the phrase *amor coniugal* in ten published sentences. What caused this increase? An examination of the annual allocation to the Roman Rota provides a possible explanation. In the 2007 allocution, Benedict XVI spoke of the need to articulate the anthropological and saving truth of marriage, which is indissoluble by its

⁹ See, for example, León DEL AMO PACHÓN, "Amor conyugal y la nulidad del matrimonio," in *IC*, 17 (1966), 60.

¹⁰ TRIBUNAL OF THE ROMAN ROTA, *coram* CABERLETTI, 3 February 2005, in *RRT Dec*, 97 (2013), 54-69.

¹¹ *Ibid.*, no. 5, 60.

¹² English translation *Code of Canon Law: Latin-English Edition, New English Translation*, Washington, Canon Law Society of America, 1999.

¹³ TRIBUNAL OF THE ROMAN ROTA, *coram* MONIER, 26 January 2007, in *RRT Dec*, 99 (2014), 54-71.

¹⁴ *Ibid.*, no. 3, 55.

¹⁵ TRIBUNAL OF THE ROMAN ROTA, *coram* DEFILIPPI, 22 March 2007, in *RRT Dec*, 99 (2014), 102-119.

¹⁶ *Ibid.*, no. 8, 107.

nature. This allocution was critical of any “hermeneutic of rupture” which interpreted the Second Vatican Council in a manner that denied the indissolubility of the bond. In this allocution, the Roman Pontiff called the rotal auditors towards a study of the relationship between the intrinsic juridical foundation of marriage and the human experience of conjugal love.¹⁷ It would seem that this challenge was reflected in the rotal jurisprudence the following year. Ten sentences were published which discuss *amor coniugalis*, each written by a different prelate auditor, showing the widespread acceptance of this theological concept as a key part of matrimonial jurisprudence.

The first of these decisions, *coram* Alwan, examines a case on the possible exclusion of the *bonum coniugum* and, if not, upon a grave lack of discretionary judgement.¹⁸ This was a negative decision. In this decision, the ends of marriage are described as being the intimate communion of life and conjugal love.¹⁹ The second of these decisions, *coram* Pena, is an affirmative decision on the inability to assume the essential obligations of marriage due to causes of a psychological nature.²⁰ In this decision, *amor coniugalis* is described as entering the formal object of matrimonial consent, as an essential element of matrimonial covenant. It is also said that the incapacity to assume the obligation to establish conjugal love for a cause of a psychological nature renders a marriage null.²¹ The relationship between consent and conjugal love is described as consent being the efficient cause of marriage which, as the Second Vatican Council and John Paul II indicated, guides it to its ends of the good of the spouses and conjugal love.²²

The third of these sentences, *coram* Arokiaaraj, is a negative decision regarding the exclusion of the *bonum sacramenti*, as well as a negative decision regarding the exclusion of the *bonum coniugum*.²³ This decision attempts to justify the conciliar teaching on matrimony in the context of deficiencies in the pre-conciliar teaching. This seems to be a direct response to the 2007 allocution of Benedict XVI. In this sentence, the *ponens*, drawing on the writings of Stankiewicz, depicts *amor coniugalis* in terms of the good of the whole person and the special element and sign of conjugal friendship.

¹⁷ BENEDICT XVI, *Allocution to Roman Rota*, 27 January 2007, in *AAS*, 99 (2007), 86-91.

¹⁸ TRIBUNAL OF THE ROMAN ROTA, *coram* ALWAN, 19 February 2008, in *RRT Dec*, 100 (2016), 68-79.

¹⁹ *Ibid.*, no. 6, 69.

²⁰ TRIBUNAL OF THE ROMAN ROTA, *coram* PENA, 28 February 2008, in *RRT Dec*, 100 (2016), 80-91.

²¹ *Ibid.*, no. 6, 84.

²² *Ibid.*

²³ TRIBUNAL OF THE ROMAN ROTA, *coram* AROKIAARAJ, 13 March 2008, in *RRT Dec*, 100 (2016), 108-117.

Marriage, ordered to the procreation of children and the good of the spouses, becomes the institutionalization of conjugal love. Conjugal love is a specific element of the communion of the conjugal life. The text goes even further to say that the juridical obligation of the communion of conjugal love enters the formal object of consent, as an essential element of marriage. It is stated that the exclusion of the element of conjugal love, as a result, would result in the nullity of marriage according to the norm of canon 1101 § 2.²⁴

A fourth sentence, *coram* Sciacca, found in the affirmative on the incapacity of assuming the obligations of marriage due to reasons of a psychological nature.²⁵ This sentence describes conjugal love as a good of marriage, according to the nature of the duty.²⁶ A fifth sentence, *coram* Sable, found in the affirmative on an exclusion of the *bonum prolis*.²⁷ This decision sees conjugal love as resulting in the *bonum prolis* as an end of marriage.²⁸ A sixth sentence, *coram* Pinto, found in the affirmative on an exclusion of the *bonum sacramenti*.²⁹ In this sentence, again drawing on the works of Stankiewicz, *amor coniugal*is is said to cultivate and be intrinsically ordered to conjugal charity and forms the total union of body and spirit.³⁰

A seventh sentence, *coram* Defilippi, found in the negative regarding an exclusion of the *bonum sacramenti*.³¹ In this sentence, it is stated that genuine *amor coniugal*is is sealed by mutual faithfulness and is never profaned by adultery or divorce.³² An eighth sentence, *coram* Ciani, found in the negative concerning an inability to assume the essential obligations of marriage.³³ This decision describes a person gravely perturbed and immature in his psychological sphere who is able to establish the essential requirements for a communion of life and love and, consequently, is able to consent validly.³⁴

A ninth sentence, *coram* De Angelis, found in the negative related to the inability to assume the essential obligations of marriage, but in the affirmative

²⁴ Ibid., no. 6, 110-111.

²⁵ TRIBUNAL OF THE ROMAN ROTA, *coram* SCIACCA, 18 April 2008, in *RRT Dec*, 100 (2016), 137-163.

²⁶ Ibid., no. 15, 143.

²⁷ TRIBUNAL OF THE ROMAN ROTA, *coram* SABLE, 10 July 2008, in *RRT Dec*, 100 (2016), 214-225.

²⁸ Ibid., no. 3, 215.

²⁹ TRIBUNAL OF THE ROMAN ROTA, *coram* PINTO, 11 July 2008, in *RRT Dec*, 100 (2016), 236-244.

³⁰ Ibid., no. 3, 238.

³¹ TRIBUNAL OF THE ROMAN ROTA, *coram* DEFILIPPI, 23 October 2008, in *RRT Dec*, 100 (2016), 268-284.

³² Ibid., no. 5, p. 272.

³³ TRIBUNAL OF THE ROMAN ROTA, *coram* CIANI, 29 October 2008, in *RRT Dec*, 100 (2016), 295-302.

³⁴ Ibid., no. 3, 296.

in the non-consummation of the marriage.³⁵ In this case, it was mentioned that it must be incapacity to assume the communion of love, not simply difficulty.³⁶ The final sentence, *coram* Yaacoub, found in the negative on the exclusion of the *bonum prolis*.³⁷ This sentence placed the procreative end of the *amor coniugalis* as the conciliar foundation for the *bonum prolis*.³⁸

In 2009, four published sentences included the phrase *amor coniugalis*. The first of these, *coram* Pinto, found in the affirmative on the grounds of an exclusion of the *bonum prolis* as well as the *bonum sacramenti*.³⁹ This judgement emphasized that love does make or replace consent, and love is not needed to accept a person. However, marriage is described as a “pact of love.”⁴⁰ A second sentence, again *coram* Pinto, found in the affirmative on the grounds of an exclusion of both the *bonum prolis* and the *bonum sacramenti*.⁴¹ This sentence exalts a personalist interpretation, in which the conciliar teaching regarding *amor coniugalis* is cited.⁴² A third sentence, *coram* Arokiaraj, found in the negative on the ground of an exclusion of the *bonum prolis*.⁴³ This emphasized conjugal love as being properly ordered towards the procreation of children, as “was stated by the most wise Pontiff.”⁴⁴ The fourth sentence, *coram* Alwan, found in the negative on grounds of both partial and total simulation.⁴⁵ In this sentence, the auditor draws on the 1997 writings of Cormac Burke and indicates that conjugal love is the voluntary assumption, on the part of the will, of the fondness towards the other party.⁴⁶ Alwan cites the phrase of Cormac Burke, “*E-lectio autem fit di-lectio*” – the selection is made by love.⁴⁷

³⁵ TRIBUNAL OF THE ROMAN ROTA, *coram* DE ANGELIS, 12 November 2008, in *RRT Dec*, 100 (2016), 303-316.

³⁶ *Ibid.*, no. 5, 305.

³⁷ TRIBUNAL OF THE ROMAN ROTA, *coram* YAACOUB, 26 November 2008, in *RRT Dec*, 100 (2016), 358-367.

³⁸ *Ibid.*, no. 5, 359.

³⁹ TRIBUNAL OF THE ROMAN ROTA, *coram* PINTO, 27 March 2009, in *RRT Dec*, 101 (2016), 34-58.

⁴⁰ *Ibid.*, no. 3, 36.

⁴¹ *Ibid.*, 45-58.

⁴² *Ibid.*, no. 3, 47.

⁴³ TRIBUNAL OF THE ROMAN ROTA, *coram* AROKIARAJ, 14 July 2009, in *RRT Dec*, 101 (2016), 221-229.

⁴⁴ *Ibid.*, no. 3, 223.

⁴⁵ TRIBUNAL OF THE ROMAN ROTA, *coram* ALWAN, 23 July 2009, in *RRT Dec*, 101 (2016), 247-273.

⁴⁶ *Ibid.*, no. 5, 249.

⁴⁷ *Ibid.*

In 2010, three rotal sentences made use of the phrase *amor coniugalis*. The first of these, *coram* Caberletti, found in the negative on the ground of a grave defect of discretionary judgement.⁴⁸ In this sentence, he quotes John Paul II's 1999 allocution to the Roman Rota, in which he stated: "*Amor coniugalis* is not only, above all, sentiment; instead it is essentially a commitment to the other person, commitment to those who are assumed with a specific act of the will; it is this which makes it properly rendered as *amor coniugalis*. Once the commitment is given and accepted by consensus, love becomes conjugal, and never loses this character."⁴⁹

A second sentence, *coram* Turnaturi, found in the affirmative on the incapacity to assume the essential obligations of marriage.⁵⁰ This sentence placed conjugal love as established by the creator for the perfection of persons by means of irrevocable consent, guided towards the good of the spouses and the procreation and education of children.⁵¹ The third and final sentence was issued *coram* Pena in the negative on the grounds of a grave lack of discretionary judgement, an inability to assume the essential obligations of marriage, and partial simulation *contra bonum coniugum*.⁵² This sentence places *amor coniugalis* as a remedy for concupiscence, along with marriage itself.⁵³

Conclusions

The jurisprudence of the Roman Rota offers an insight into how the concept of *amor coniugalis* has become a central theme in the Church's understanding of matrimony in the decades since the Second Vatican Council. This teaching has largely drawn on *Gaudium et spes* to illuminate the centrality of conjugal love as an intrinsic part of matrimony. Certainly, one cannot confuse love as a necessary factor in the act of *matrimonium in fieri*. At the same time, conjugal love does have a central role related to the obligations and ends of marriage.

⁴⁸ TRIBUNAL OF THE ROMAN ROTA, *coram* CABERLETTI, 28 January 2010, in *RRT Dec*, 102 (2017), 29-45.

⁴⁹ *Ibid.*, no. 3, 35.

⁵⁰ TRIBUNAL OF THE ROMAN ROTA, *coram* TURNATURI, 25 March 2010, in *RRT Dec*, 102 (2017), 118-141.

⁵¹ *Ibid.*, no. 10, 121.

⁵² TRIBUNAL OF THE ROMAN ROTA, *coram* PENA, 26 March 2010, in *RRT Dec*, 102 (2017), 142-148.

⁵³ *Ibid.*, no. 5, 145.

This review of rotal jurisprudence has offered several guidelines that offer further guidance and explanation as to the nature of *amor coniugalis*. First, *amor coniugalis* has primarily been discussed in cases of simulation of matrimonial consent, along with an inability to assume the essential obligations of marriage, especially with respect to the *bonum prolis* and the *bonum sacramenti*. Following our review of the magisterial teaching on this topic, this should come as no surprise. With respect to the *bonum prolis*, conjugal love reaches its fullness in a fecund marriage in accord with the natural law.⁵⁴ Conjugal love is intrinsically ordered towards the *bonum prolis*, especially in terms of acts *in se* capable of procreation, sexual acts that respect the dignity of the human person (that is, are *in humano modo*), and the important educational aspect of the good of children. An exclusion or inability to assume conjugal love thus impacts the validity of the sacrament in as much as it has the potential of excluding the ends of marriage related to the *bonum prolis* to which *amor coniugalis* points and, in fact, is an integral and arguably necessary factor.

With respect to the *bonum sacramenti*, true *amor coniugalis* is unreserved and a total self-gift.⁵⁵ Of course, this sincere gift can occur in different manners. Some accept perfect and perpetual continence for the sake of the kingdom, while others are called to this sincere gift of conjugal love that leads to conjugal charity. In order to be a true and sincere gift, conjugal love must be total, unreserved and, consequently, irrevocable. It is not sufficient for one to say, “I love you until ...” or “I love you unless ...”. In fact, such positions deny true conjugal love, in that they deny the permanence which is a central feature of that sincere gift. True conjugal love survives infidelity and even civil divorce, recognizing that the bond, while attacked, remains indissoluble.⁵⁶ An inability to assume this obligation of radical permanence, or an exclusion of this aspect of conjugal love, also impacts the validity of the union as something contrary to the total gift of self which has been the design of marriage by the Creator.

Finally, this overview of conjugal love has shown the response of the Roman Rota to a concrete proposal – perhaps even a challenge – by the Roman Pontiff. The 2007 allocution of Benedict XVI emphasized the need to maintain the hermeneutic of continuity and avoid the hermeneutic of rupture when interpreting the teachings of the Second Vatican Council. Interpretations of the conciliar teaching cannot result in conclusions that are

⁵⁴ GS, no. 49; JOHN PAUL II, *Familiaris consortio*, no. 11, 92.

⁵⁵ GS, no. 24.

⁵⁶ CCC, no. 1649.

contrary to the clear and consistent teaching of the universal magisterium, such as a possible ultimate denial of the indissolubility of the bond. Interestingly, the rotal auditors seem to have offered a defense of the conciliar teaching, largely drawing on the writings of John Paul II, and see *amor coniugalis* as a natural development in the deficiencies with respect to later developments in understanding of the human person and articulations of the equality of the spouses. *Amor coniugalis* does not replace matrimonial consent, but it is something which must be in principle accepted as part of the rights and obligations of marriage, especially in terms of the *bonum prolis* and the *bonum sacramenti*, vis-à-vis *matrimonium in facto esse*. In this articulation, the auditors also offer a unique explanation as to how a novel theological concept can be shown to relate to the juridical foundation of marriage in a manner that is in harmony with genuine tradition.

Tertullian wrote: “How wonderful the bond between two believers with a single hope, a single desire, a single observance, a single service! They are both brethren and fellow-servants; there is no separation between them in spirit or flesh; in fact they are truly two in one flesh, and where the flesh is one, one is the spirit.”⁵⁷ This notion of conjugal love, articulated definitively at the Second Vatican Council, is obviously rooted in Christian tradition. Saint Paul speaks about the two becoming one flesh in his letter to the Ephesians, reminding the husband to love his wife as he loves his own body, for the wife is part of who he has become (Eph 5:28). Conjugal love orients the husband and wife towards each other for mutual sanctification, especially in the transmission of the faith through the raising of children and the associated sanctification of the domestic Church. This total gift of self – a gift that is unreserved, permanent, complete, selfless, and open to life – opens the relationship to each other, and leaves the couple open to the presence of God, who sanctifies their love, strengthens it, offers supernatural assistance to the challenges of married life, and brings conjugal charity into the relationship.

⁵⁷ TERTULLIAN, *Ad uxorem*, II, VIII, 6-8: CCL, I, 393.

THE RESTRUCTURING OF RELIGIOUS INSTITUTES IN THE CURRENT REALITY

SR. BONNIE MACLELLAN, CSJ

SUMMARY — The article surveys current statistics on the decline of religious institutes and societies of apostolic life in North America. In light of these “signs of the times,” the A. then explores various options for the juridical restructuring of institutes, both those foreseen in the *Code of Canon Law* as well as other options currently in practice. The aim is to assist religious institutes and societies of apostolic life, and the canonists who advise them, in an orderly preparation for a hope-filled future.

RÉSUMÉ — Cet article examine les statistiques actuelles sur le déclin des instituts religieux et des sociétés de vie apostolique en Amérique du Nord. À la lumière de ces “signes des temps”, l’A. explore ensuite diverses options pour la restructuration juridique des instituts, celles prévues par le Code de droit canonique ainsi que d’autres options présentement mises en pratique. Le but est d’aider les instituts religieux et les sociétés de vie apostolique, de même que les canonistes qui les aident, dans leur préparation ordonnée pour un futur plein d’espoir.

Introduction

It is a well-known fact that most religious institutes and societies of apostolic life¹ in Europe and North America have been in decline for the past several decades. With few or no vocations and aging and dying members, many are on the verge of extinction, especially smaller institutes without international provinces. This article explores various canonical solutions to address this phenomenon. In four parts, it first assesses the current realities faced by institutes and societies, the “signs of the time” that call for new planning and changes in structures. The second part considers several possibilities for restructuring foreseen in canon law: the merger and union of institutes, the merger of provinces,

¹ Further references to “religious institutes” alone are inclusive also of societies of apostolic life, and references to “religious” are also inclusive of members of said societies.

and dissolution (suppression or extinction). The third part surveys some additional options for restructuring: the transferal of some or most of an institute's responsibilities to another public juridic person, the transferal of administrative responsibility to a lay board, and various models of collaborative governance. A brief fourth part highlights the canonical and practical significance of bishops in the restructuring efforts of religious, especially diocesan bishops, not only for institutes of diocesan right but for pontifical right institutes as well.

1 — *The Current Reality* ***Reading the Signs of the Times***

There was a day, not so many years ago, when most religious would never have dreamt that the religious institutes, which had worked in collaboration with diocesan bishops and founded ministries to care for the needs of immigrants flooding to Canada in the mid-eighteenth and early nineteenth centuries, would one day be forced to shut their doors. Yet, this is prophetically foreseen in the Vatican II Decree *Perfectae caritatis* on the renewal and adaptation of religious life, which states that if no “reasonable hope of further development” is evident in an institute, the Holy See should forbid the acceptance of novices. Such institutes should be absorbed into already existing, more vigorous communities which have the same purpose and spirit. The Decree goes on to say that institutes that share similar charisms, belong to the same religious family, or share similar constitutions and apostolates, are encouraged to form federations or unions.² In instances in which leadership within a religious institute is unable or unwilling to consider alternative configurations, the Holy See may choose to intervene in the internal governance and forbid acceptance of novices, as well as mandate absorption of the members into another institute.³

At the same time that religious institutes responded to the Church's call for renewal and adaptation, they have experienced a period of breakdown. Some of the signs of this include:

- dismantling of institutions and structures;
- abandonment of some belief systems that had served religious life historically;

² See SECOND VATICAN COUNCIL, Decree on the Sensitive Renewal of Religious Life *Perfectae caritatis*, 28 October 1965, in AAS, 58 (1966), 702-712, English translation in TANNER II, 939-947, no. 22 (= PC).

³ See E. McDONOUGH, “Mergers, Unions, Federations and Confederations,” in *Review for Religious*, 63 (2004), 204-205 (= McDONOUGH, “Mergers”).

- more requests from perpetually professed religious for dispensation from their vows;
- transition from shared apostolates to individualized ministries;
- polarization of theologies and beliefs into traditional or progressive definitions;
- and apostolates which had long been sponsored by religious institutes being transferred to new sponsorship models due to lack of resources and/or personnel.⁴

Vocations to religious institutes have dwindled. Some sociologists have suggested that the growth of religious institutes, which peaked in the mid-twentieth century, was a sociological anomaly.⁵ Others have suggested that all organizations, be they religious or secular, enjoy a natural lifecycle,⁶ with an average lifespan of three hundred years.⁷ Fully mature organizations have the capacity for renewal, which usually includes realignment of key aspects of their identity and mission in response to internal and external organizational pressures.⁸

The decline in vocations should not be surprising. Religion in the public sphere has seen a marked decline.⁹ In 2013, the Pew Research Center noted the percentage of Canadians who identified as Catholic had dropped from 47% to 38% over the past four decades, while Protestant traditions saw an even more dramatic decline from 41% to 27%.¹⁰ Twenty-nine percent of Canadians born between 1967 and 1986 claim no religious affiliation, as of

⁴ See S. EUART, “The Year of Consecrated Life: Pilgrimage for Religious in the 21st Century,” in *Origins*, 45 (2015-2016), 287.

⁵ See P. WITTEBERG, *The Rise and Decline of Catholic Religious Orders: A Social Movement Perspective*, Albany, NY, State University of New York Press, 1994.

⁶ See J. KIMBERLY and R. MILES, *The Organizational Life Cycle: Issues in the Creation, Transformation, and Decline of Organizations*, San Francisco, Jossey-Bass, 1980.

⁷ See C. VAN DAM, T. SPONSELEE, and A. LEYS, “Explorations on the ‘Completion’ of Religious Institutes,” in *Research Centre for Religious Institutes (RCRI) Bulletin*, 8 (2012), 9-27, at www.marianites.org/uploads/files/newsletters/2012FallBulletin.pdf (= VAN DAM et al., “Explorations”).

⁸ See A. HEREFORD, *Navigating Change: The Role of Law in the Life-Cycle of a Religious Institute*, St. Louis, Religious Life Project, 2014, 102, Kindle ed.

⁹ See B. ALLEN, “From Sacred to Secular: Canada Set to Lose 9,000 Churches, Warns National Heritage Group,” 10 March 2019, *CBC News*, at www.cbc.ca/news/canada/losing-churches.

¹⁰ See PEW RESEARCH CENTRE, “Canada’s Changing Religious Landscape,” 27 June 2013, at www.pewforum.org/2013/06/27 (= PEW RESEARCH CENTRE, “Canada’s Changing Religious Landscape”).

2011. The decline in nuns in North America¹¹ and the rise of the “nones” (no religious affiliation)¹² reflects this drop in religious commitment in the Canadian public. The Centre for Applied Research in the Apostolate (CARA) in the United States noted the decline in all Catholic vocations, including the priesthood, diaconate, and religious life, since Vatican II. In 1970, religious sisters in the United States numbered 160,931. In 2018, that number decreased to 44,117, a decline of 73%.¹³ The members of these institutes are aging (age sixty and over),¹⁴ and religious institutes in Canada have seen similar declines.¹⁵ From 1975 to 2019, the decline in the number of religious serving the Church decreased by 80%.¹⁶

Congregational leaders have begun to shift their focus from much needed apostolates of service in the Church to care of their members as they age.¹⁷ In 2018, CARA surveyed members of religious institutes to assess their attitudes, priorities, and needs in relation to mission, ministry, charism, prayer, spirituality, community life, vocation promotion, initial formation, ongoing formation, and collaboration.¹⁸ The statistics reveal some sobering realities. Eighty percent of those institutes surveyed had no one professing perpetual vows in 2018.¹⁹

¹¹ See I. PERITZ, “Quebec’s Dwindling Number of Catholic Nuns Spells End of Era in Province,” in *The Globe and Mail*, 25 July 2018, at www.theglobeandmail.com/canada/article.

¹² See K. OAKES, “What Can Nuns and ‘Nones’ Learn from One Another,” in *America*, 4 September 2018, at www.americamagazine.org/faith/2018/09/04.

¹³ CENTER FOR APPLIED RESEARCH IN THE APOSTOLATE (CARA), “Frequently Requested Church Statistics,” at www.cara.georgetown.edu.

¹⁴ See CARA, “Report on Recent Vocations to Religious Life in the U.S.: Executive Summary,” in *Origins*, 39 (2009-2010), 198 (= CARA, “Report on Recent Vocations”).

¹⁵ See M. KRAMAREK and M. GAUTIER, *Recent Vocations to Religious Life in Canada: A Report for the National Association of Vocation and Formation Directors*, Washington, CARA, 2018.

¹⁶ See CANADIAN RELIGIOUS CONFERENCE (CRC) Statistics, at www.crccanada.org/en/whoare-weststatistics. The number of religious men and women in Canada was, in 1975, 55,180; in 2004, 22,471; in 2010, 19,235; in 2013, 16,626, in 2015, 13,126; in 2018, 12,220; and in 2019, 11,054.

¹⁷ See J. TOBIN, “What Are We Missing? What Should We Say?” in *Origins*, 40 (2010-2011), 201.

¹⁸ See CARA, “Religious Life Research,” at www.cara.georgetown.edu/services/religiousinstitutes, 2019.

¹⁹ T. DO and M. GAUTIER, “Women and Men Professing Perpetual Vows in Religious Life: The Profession Class of 2018: Report to the Secretariat of Clergy, Consecrated Life and Vocations, United States Conference of Catholic Bishops, CARA, at www.cara.georgetown.edu/ProfessionClass2018.pdf, January 2019.

The reasons for these shifts are many and include Vatican II's emphasis on the universal call to holiness for all the faithful;²⁰ enhanced ministry options for young women;²¹ and a general apathy related to religious practices of any nature.²² All of this has understandably resulted in the decline in the number of consecrated persons in North America. Canonist Francis Morrissey remarked that approximately one religious institute is dissolved each month.²³ "Concerns about declining numbers of vocations, aging and overworked religious, ministerial burnout and loss of an authentic religious spiritual life were major issues for the Church's hierarchy in the first half of the twentieth century. This was not simply a post-Vatican II phenomenon."²⁴

1.1 — Assessing the Current Reality in Faith

The current reality offers an opportunity for religious to redesign their path, develop new rules, and identify new forms of involvement, focusing on positive experiences and rejecting negative ones. This is a time for discernment and new envisioning. Only from a stance of trust versus resignation can religious institutes face the difficulty of the present moment.²⁵

In 2014, Pope Francis proclaimed a year to recognize and celebrate the gift of consecrated life to the Church and the world.²⁶ This celebration coincided with the fiftieth anniversary of the Dogmatic Constitution on the Church, *Lumen gentium*, which has a chapter entitled "Religious,"²⁷ and the Decree *Perfectae caritatis*, on the renewal of religious life. The aims of this year were initially proposed by Pope John Paul II at the dawning of the third millennium and based on his Postsynodal Apostolic Exhortation *Vita consecrata*: "You have not only a glorious history to remember and to recount, but also a great history still to be accomplished! Look to the future, where

²⁰ See *LG*, no. 11.

²¹ See P. BEDNARCZYK, "Address to LCWR on Vocations to Religious Life Study," in *Origins*, 39 (2009-2010), 205-207.

²² See PEW RESEARCH CENTRE, "Canada's Changing Religious Landscape."

²³ Private conversation with Fr. Francis Morrissey, OMI.

²⁴ M. CONFOY, "Religious Life in the Vatican II Era: 'State of Perfection' or Living Charism?" in D. SCHULTENOVER (ed.), *50 Years On. Probing the Riches of Vatican II*, Collegeville, Liturgical Press, 2015, Kindle ed., 393.

²⁵ See BENEDICT XVI, Encyclical Letter *Caritas in veritate*, 29 June 2009, in *AAS*, 101 (2009), 641-709, no. 21; English translation in *Origins*, 39 (2009-2010), 129-160.

²⁶ See FRANCIS, Apostolic Letter to All Consecrated People on the Occasion of the Year of Consecrated Life *Scrivo a voi*, 21 November 2014, in *AAS*, 106 (2014), 935-947, English translation in *Origins*, 44 (2014-2015), 482-488 (= FRANCIS, Apostolic Letter *Scrivo a voi*).

²⁷ See *LG*, nos. 48-47.

the Spirit is sending you in order to do even greater things.”²⁸ Using human logic, if the future is based on the past, the role of religious institutes in the Church into the future would appear to be less than robust. Yet, from the perspective of faith, all things are possible with God.²⁹ As Yahweh promised to the Israelites, “I am making all things new.”³⁰ What is the newness to which God is inviting consecrated life to be expressed in new ways?

The Church in her wisdom recognizes that it is not easy to move from the administration of well-known situations and apostolates towards “unknown destinations and ideals with a conviction that generates real trust.”³¹ Accelerated change may tempt congregational leaders to focus on emergencies instead of horizons which, in the end, may be detrimental to a life that is full of meaning and called to prophetic witness.³² Despite these foreboding statistics, religious institutes have attempted to incorporate the invitation of Pope John Paul II to have hope.

The various difficulties stemming from the decline in personnel and apostolates must in no way lead to a loss of confidence in the evangelical vitality of consecrated life, which will always be present and active in the church... New situations of difficulty are therefore to be faced with the serenity of those who know that what is required of each individual is not success but commitment to faithfulness. What must be avoided at all costs is the actual breakdown of consecrated life, a collapse that is not measured by a decrease in numbers but by a failure to cling steadfastly to the Lord and to one’s personal vocation and mission.³³

Some have suggested that religious have been “hoodwinked into discouragement,” replacing a language of abundance with a vocabulary and mode of thinking that centers on diminishment.³⁴ Instead, to quote the words of Teilhard de Chardin, “The future belongs to those who give the next generation reason to hope.”³⁵ Pope Francis’ invitation to “be bold and creative in

²⁸ JOHN PAUL II, Post-synodal Apostolic Exhortation on Consecrated Life *Vita consecrata*, 25 March 1996, in AAS, 88 (1996), 377-486, no. 110, English translation in *Origins*, 25 (1995-1996), no. 37 (= VC).

²⁹ See Matthew 19:23-30.

³⁰ See Isaiah 43:18, 19; 65:17; Revelation 21:5; Eph. 4:24; Hebrews 8:13.

³¹ See CONGREGATION FOR INSTITUTES OF CONSECRATED LIFE AND SOCIETIES OF APOSTOLIC LIFE (CICLSAL), Guidelines, *New Wine in New Wineskins: The Consecrated Life and Its Ongoing Challenges since Vatican II*, Vatican City, Libreria Editrice Vaticana, 2017, 13 (= CICLSAL, *New Wine in New Wineskins*).

³² Ibid.

³³ See VC, no. 63.

³⁴ D. COUTURIER, “Religious Life at the Crossroads,” in *Origins*, 36 (2006-2007), 181-188.

³⁵ P. TEILHARD DE CHARDIN, at www.quoteency.com/quote/1130135.

this task of rethinking the goals, structures, style and methods”³⁶ applies to governing bodies and practices at all levels of the Church. The mission of the Church belongs to the movement of God’s Spirit. No authority, not even a founder, can be the exclusive interpreter of the charism.³⁷

If the climate of a religious institute has cooled to the point that it no longer invites women or men to consider a public and lifelong witness to Jesus Christ and the values of the kingdom, we can expect the Holy Spirit to raise up new forms of consecration.³⁸ Some new institutes that were founded since Vatican II have adopted more traditional practices of religious life, including wearing a religious habit,³⁹ common prayer, daily Eucharist, and the Liturgy of the Hours.⁴⁰ They seem to be experiencing growth in their membership.⁴¹ New members note their desire to enter a religious institute where they can live, work, and pray with other members,⁴² and they are particularly attracted to the institute’s fidelity to the Church.⁴³ Others who have watched the growth of newer, more traditional forms of religious life have suggested that they offer young Catholics an opportunity to live out their faith in a way that is “real and that’s robust...; they are looking to just totally lay down their lives in service of the church.... If they’re going to make a sacrifice [which] is that counter-cultural and extreme, they’re going to go all in.”⁴⁴

Moving forward, the challenge is to express the evangelical counsels and charisms in cultural forms that can be “heard” within the culture without succumbing to the temptation to appropriate cultural values that are antithetical to the Gospel.⁴⁵ Pope Paul VI invited the renewal of religious life in light of the call of Vatican II that is as relevant today as it was when it was first proclaimed. “How can the message of the Gospel penetrate the world? What can be done at those levels in which a new type of culture is unfolding? ...

³⁶ FRANCIS, Apostolic Exhortation *Evangelii gaudium*, 26 November 2013, in AAS, 105 (2013), 1020-1147, English translation in *Origins*, 43 (2013-2014), 421-466, no. 30.

³⁷ See CICLSAL, *New Wine in New Wineskins*, 24.

³⁸ J. TOBIN, “A Great History Still to Be Accomplished? Prospects for Consecrated Life in the Church—*Communio*,” in *Origins*, 44 (2014-2015), 257 (= TOBIN, “A Great History”).

³⁹ See S. LECK, “Rise of the Radical Nuns,” in *The National Post*, 27 Sept 2017, at www.nationalpost.com/feature (= LECK, “Rise of the Radical Nuns”).

⁴⁰ See M. BENDYNA, Address to LCWR on Vocations to Religious Life Study, in *Origins*, 39 (2009-2010), 201 (= BENDYNA, Address to LCWR).

⁴¹ See CARA, “Report on Recent Vocations,” 196.

⁴² See *ibid.*, 198.

⁴³ See BENDYNA, Address to LCWR, 201.

⁴⁴ LECK, “Rise of the Radical Nuns.”

⁴⁵ See TOBIN, “A Great History,” 259.

Dear religious ... you must give your full attention to the needs of men, their problems and their searching; you must give witness in their midst, through prayer and action, to the good news of love, justice and peace... Such a mission, which is common to all the people of God, belongs to you in a special way.”⁴⁶

Religious life has continued to evolve, even as it has remained true to its fundamental nature,⁴⁷ and it continues to offer evidence of the power of God’s Spirit, which blows where it wills, breathing new life into the Church.⁴⁸ Can religious institutes identify or create coherence between changing structures, organisms, and roles, as noted at Vatican II?⁴⁹ Doing this will require that we take a long and loving look at our current reality, including a realistic assessment of an institute’s viability in the future.

1.2 — Criteria to Determine an Institute’s Viability

As members of religious institutes age, the pool of people willing and able to serve in the ministry of leadership can quickly dry out. In such situations, a religious institute can appoint a religious from another institute, pending negotiation with another institute or entity. However, because many religious institutes in the northern hemisphere have experienced significant declines in vocations and an aging membership, institutes that were able to share leadership personnel will, in the not too distant future, face comparable challenges as the institute they are assisting. While an institute may have sufficient financial resources, it lacks the capacity to carry out its mission, because all able-bodied members are occupied with internal responsibilities. It is then that such religious institutes must take a long and loving look at the reality in which God’s Spirit continues to move.

In Pope Francis’ apostolic letter marking the year of consecrated life, he invites consecrated persons to become “experts in communion,”⁵⁰ as has been evidenced by both canonically recognized intra- and inter-congregational relationships. A series of questions developed in the Netherlands may be of assistance to religious institutes to obtain an overview of their present

⁴⁶ PAUL VI, Apostolic Exhortation on the Renewal of the Religious Life according to the Teaching of the Second Vatican Council, *Evangelica testificatio*, 29 June 1971, in AAS, 63 (1971), 497-526, no. 52; English translation in *CLD*, vol. 4, 425-454.

⁴⁷ See C. ZINN, Presidential Address at LCWR Assembly, in *Origins*, 44 (2014-2015), 250.

⁴⁸ See TOBIN, “A Great History,” 260.

⁴⁹ See *PC*, no. 204.

⁵⁰ See FRANCIS, Apostolic Letter *Scrivo a voi*, no. 2.

situation and begin planning for the future.⁵¹ These questions are divided into seventeen areas of concern: purpose; spirituality; pastoral care; management and governance; international financial relations; novices; apostolate; accommodation and care; finance; investments; reserves; archives, art, and cemetery; external support; position of laity; important documents; and general. (See Appendix One.)

Institutes can do some internal restructuring without approval from the Holy See (c. 581). However, changes which require amendments to the institute's constitution or changes to the juridic character of an institute require approval from the competent authority (c. 587 § 2). When assessing congregational viability, the Holy See considers the following: (1) the institute's median age is in the seventies or eighties; (2) there have been no professions for more than twenty-five years; (3) the community is unable to provide superiors or leaders for its works; and (4) no diocesan bishop is requesting members to assist in apostolates.⁵² At this point, religious institutes have options regarding their future, either preparing for a holy death or some reconfiguration of their existing structure. These include both options foreseen in canon law and others that are emerging as seen in recent practice.

2 — Canonical Options

Canon law foresees four options involving changes to the juridical status of religious institutes that are pertinent to this discussion, including union (cc. 121, 582); fusion, also known as “merger” (c. 582);⁵³ the creation of new provinces (c. 581); and extinction or suppression (cc. 123, 584).⁵⁴ Reconfigurations which require altering the status of any of the juridic persons involved require approbation of the competent ecclesiastical authority.

⁵¹ See SECRETARIAT OF THE CONFERENCE OF RELIGIOUS IN THE NETHERLANDS (KNR), “Questionnaire to Assist Religious Institutes with Obtaining an Overview of Their Present Situation and Making Arrangements for the Future,” in VAN DAM et al., “Explorations.” See also A. LEYS, “Structuring ‘Completion’ of a Religious Institute: Some Canonical Provisions,” in *Jur*, 76 (2016), 447-487 (= LEYS, “Structuring ‘Completion’ of a Religious Institute”).

⁵² See PAUL VI, Apostolic Letter m.p. *Ecclesiae Sanctae* II, Norms for the Implementation of the Decree *Perfectae caritatis* of the Second Vatican Council, 6 August 1966, in AAS, 58 (1966), 775-782, nos. 39-41, English translation in *CLD*, vol. 6, 284-293.

⁵³ See E. McDONOUGH, “Mergers, Unions, Federations and Confederations,” in *Review for Religious*, 63 (2004), 204-210 (= McDONOUGH, “Mergers”).

⁵⁴ See F. MORRISEY, “Strategies for the Future: Restructuring Religious Institutes and Implications of the Decision to Proceed,” *Legal Education for Leadership of Religious Institutes*, Ottawa, Saint Paul University, 17 June 2015, 5-6 (= MORRISEY, “Strategies for the Future”).

Federations and confederations create a new juridic relationship to already existing institutes and require approval of the Holy See, but these are not the concern of this paper.⁵⁵

2.1 — Merger and Union

A *merger* is the extinction of one institute through a fusion with another.⁵⁶ For example, religious institute A is suppressed and ceases to exist legally. Each of its members becomes a member of existing religious institute Z, into which it is merging. Any number of religious institutes can merge into an existing institute.⁵⁷ A *union*, which often reflects an institute's desire to ensure the continuation of its mission and charism, is accomplished through the dissolution of two or more religious institutes and the creation of a new institute.⁵⁸ A merger or union requires a significant positive response by the members to implement the change. Usually, a non-binding "straw vote" requires a majority of 60-70% of the members supporting the merger or union to continue the reconfiguration planning. This is followed by a signed vote, which requires a majority of 80% in favour of the merger or union. Votes for reconfiguration requiring suppression of an institute are held at the general chapter. Chapter confirmation of the resolution to unite, fuse, or dissolve requires a two-thirds majority. No merger or union can occur without the direct, specific, and verifiable involvement by the general chapter and the members of the institute that will cease to exist legally as a final result of the process.⁵⁹

Members of merged or united institutes have limited options for participation (for which the Holy See seeks a written record). These include incorporation into the new religious institute, transfer to another religious institute (cc. 684-685), or a request for an indult of departure from religious life (c. 691). Perpetually professed members of the institute which ceases to exist canonically have a vested right to remain members of those structures and to have their legitimate needs met as long as they live, unless they depart or are legitimately dismissed (cc. 654, 670). The rights and responsibilities of

⁵⁵ See McDONOUGH, "Mergers," 206.

⁵⁶ See R. McDERMOTT, "Norms Common to All Institutes of Consecrated Life (cc. 573-606)," in CLSA *Comm2*, 750 (= McDERMOTT, "Norms").

⁵⁷ See McDONOUGH, "Mergers," 206.

⁵⁸ Teilhard de Chardin suggested that union is coded into the very fabric of the cosmos. See K. DUFFY, "The Power of Love in an Unfinished World," 22 August 2016, at www.omega-center.info.

⁵⁹ McDONOUGH, "Mergers," 207.

the members automatically transfer to the new juridic entity. Members not wishing to be part of the merger or union may petition for a period of exclaustation (c. 686) to discern the option to transfer to another religious institute or leave the institute. Members of institutes being united or merged who do not indicate their choice of transfer, departure, or exclaustation automatically belong to the new or existing legal entity. Neither merger nor union requires a new profession of vows.⁶⁰

2.1.1 — Requirements for pontifical right institutes

Any restructuring planning involving a change in the juridical status of a pontifical right religious institute must include regular and transparent dialogue with the members, the diocesan bishop, and the Holy See. It is best to ensure that the Holy See is aware of the realities the institute is facing, including dwindling and aging membership as well as finite resources. When the institute has completed necessary plans for reconfiguration, a formal request is sent to the Holy See (six copies) including a chancery fee of approximately 500 euros.⁶¹ The petition sent by each participating institute's general superior must include: (1) a brief history of the institute including a description of the charism, spirituality, and apostolic activities; (2) pertinent statistics including the number of perpetual and temporary professed members, novices, postulants, the ages of perpetually professed, and the academic qualifications of members; (3) a list of congregational ministries; (4) a list of local communities; and (5) a list of dioceses in which the institute is established. This data will establish the facts for the request for union or merger.

Also included in the petition for a merger or union are the following documents: (1) the acts of the general chapter approving the merger or union; (2) a letter from the general superior and council of the receiving institute noting their willingness to accept the merger or union; (3) results of pre-chapter and chapter votes and letters of intent; (4) the *votum* of the diocesan bishop; and (5) the arrangements that have been made for those who do not wish to join the reconfigured institute. For institutes that have chosen union with another religious institute, the following documents must additionally be prepared: (1) an explanation of the process (the journey to union); (2) a preliminary agreement regarding the disposition of temporal goods; (3) the title, purpose, spirituality and, if applicable, the religious habit of the new institute;

⁶⁰ Ibid.

⁶¹ See MORRISEY, "Strategies for the Future," 20.

(4) the place and diocese of the principal seat of the new institute; (5) draft copies of the new constitution which will require approval of the general chapter of the new institute; (6) the name and contact information of the religious leading the group provisionally in the period prior to the first general chapter. All this leads up to the grant of the necessary indult from the Holy See.⁶²

2.1.2 — *Merger: recent examples*

Two recent examples of mergers involved institutes of Canadian women religious merging with other such institutes. One of these was the Newfoundland Presentation Sisters, who had first arrived in Canada from Galway, Ireland in 1833. On 1 November 2014, the institute announced that it had received a decree from the Holy See authorizing the fusion of their congregation with the Union of Sisters of the Presentation, effective 1 November 2014.⁶³ Through this fusion, the Presentation Sisters joined the International Union of Sisters of the Presentation of the Blessed Virgin Mary, whose generalate is based in Ireland. Another merger, in 2013, involved the Sisters of Our Lady of the Cross which merged with the Sisters of St. Joseph of Chambery.⁶⁴ Since members of a smaller religious institute may feel that they are being “taken over” by a larger institute, it behooves the congregational leaders engaging in a merger to consider the emotional effects on the members and to support all who are participating in the new venture.

2.1.3 — *Union: The Sisters of St. Joseph in Canada*

In 2007, the Federation of the Sisters of St. Joseph of Canada met to discuss the potential union of the member institutes of the Canadian Congregation of St. Joseph (CSJ) family to form a new religious institute. Over the following two years, members of the individual congregations met and prayed to discern “God’s invitation to newness.” In 2009, all Canadian CSJ congregations were asked to offer their vote regarding merger. As a result, four CSJ congregations (with seats in Peterborough, London, Hamilton, and Pembroke) voted to unite to form the Sisters of St. Joseph in Canada. The Toronto and Sault Ste. Marie CSJ congregations voted to remain autonomous. Although a new juridic entity

⁶² Ibid., 21.

⁶³ See SISTERS OF THE PRESENTATION OF NEWFOUNDLAND, media release, at www.presentation-sisters.ca/announcements/fusion14.pdf.

⁶⁴ See “Sisters of Our Lady of the Cross,” 20 October 2013, at www.csjchambery.org/en/conselho/110/irmas-de-notre-dame-de-la-croix; see also www.csjchambery.org/en/destaque/109/abrindonossasportascomalegria.

was created, the Federation of the Sisters of St. Joseph of Canada continues to exist. Revised Federation statutes were submitted to the Holy See and approved in 2016.

At this point in history, most religious institutes in North America are facing the same demographic realities. Merged or united institutes create larger cohorts of the same demographics. The membership has increased in number, but all are aging. Rather than addressing the fundamental issues which initially led the institute to consider alternate configurations, this fact alone can magnify the problems of dealing with aging members with increased health problems.

2.2 — Merger of Provinces

For institutes divided into provinces, two or more provinces can be united to create a larger one (c. 581). However, this strategy offers only a “paper solution” to the problem that may provide incidental and short-lived solace to address declining membership, increasing median age, and associated health issues. If the newly created province is international, it also will be forced to cope with problems unique to international realities of culture and language.⁶⁵

2.3 — Dissolution

When a religious institute is no longer able to put forward candidates for the offices of general superior and council, some suggest the best option is to consider bringing the institute to its completion through its dissolution.⁶⁶ This may occur in two ways, either actively by suppression or passively by its extinction through the death of its last member (cc. 120, 123). If the institute is suppressed, the remaining members may choose to continue to be religious. Their care and sustenance should be ensured before the suppression, which is reserved to the Holy See for institutes of both pontifical and diocesan right (c. 584). If the decision is made not to dissolve until the last member dies (cf. c. 120 § 2), this may be followed by the suppression of the juridic person, or it will become extinct *ipso iure* if there is no further activity for one hundred years (c. 120 § 1). A decision to dissolve the institute prematurely, however, could give rise to legal and tax-related complications.⁶⁷

⁶⁵ See VAN DAM et al., “Explorations,” 17.

⁶⁶ On the notion of the “completion” of a religious institute, see LEY, “Structuring ‘Completion’ of a Religious Institute,” 450, fn 10.

⁶⁷ See VAN DAM et al., “Explorations,” 17.

2.3.1 — *The Sisters of Providence of St. Vincent de Paul, Kingston*

Sister Sandra Shannon, congregational leader of the Sisters of Providence of St. Vincent de Paul of Kingston, Ontario, indicated that the decision of her community to seek dissolution was precipitated by a number of factors.⁶⁸ Prior to 2011, the council recognized a number of foreboding signs on the horizon. The motherhouse was large and provided housing for approximately fifty of their own members. The Religious Hospitallers of St. Joseph and the Congregation of Notre Dame entered into an accommodation agreement with the Sisters of Providence to offer both a residence and skilled nursing care for members of their congregations as needed. This would offer unused space to other congregations whose members are in need of care.

In 2011, the congregation still felt its future was viable, and efforts at vocation promotion continued. After three years of effort and engaging in multiple forms of advertising, no potential candidates made contact or expressed any interest in a vocation to the congregation. In 2015, the congregation hired Dale Kenney as a planning consultant. He had served as the chief executive officer of Providence Care Kingston.⁶⁹ He was tasked with reviewing the actual and projected demographics and future viability of the congregation, as well as options to continue the charism of the congregation, even if there would be no Sisters of Providence of St. Vincent de Paul. Kenney's study noted declining membership and increasing costs. Sale of the motherhouse property would be difficult and would require a commitment on the part of the congregation to demolish the building.

At the congregation's 2016 Assembly, Kenney's needs' assessment of the city of Kingston, as well as his actuarial report including possible options for congregational reconfiguration, were reviewed by the members. It was clear to the members that the Congregation of the Sisters of Providence of St. Vincent de Paul was coming to its completion and, based on the needs' assessment, the charism given to their founders to care for the most vulnerable was still needed.

A committee was formed to develop long-range plans and options for the disposition of the motherhouse and its properties. From these discussions, a vision for the creation of Providence Village was born. This option would see the motherhouse continue to be used by the sisters until the last sisters living onsite were deceased. The motherhouse and property would be transferred to the Catholic Congregational Legacy Corporation, a civil corporation

⁶⁸ S. SHANNON, telephone interview with B. MacLellan, 19 July 2019. Notes available in the private archives of the general superior, The Sisters of St. Joseph of Sault Ste. Marie, 2025 Main St. W., North Bay, ON.

⁶⁹ See www.providencecare.ca/providencecarehospital.

whose purpose is to support the sustainability of Catholic works and to improve the well-being of those at the margins of society. This includes preserving and safeguarding assets such as land, building, and investment funds.⁷⁰ The Catholic Congregational Legacy Charity is sponsored by the Catholic Health Sponsors of Ontario, a pontifical public juridic person established in 1998 “to assume sponsorship of health organizations when religious orders and congregations are ready to move on to other missions.”⁷¹ An important ministry initiated by the Sisters of Providence of St. Vincent de Paul, Kingston, the Centre for Justice and Peace and the Integrity of Creation, would also be transferred to the Catholic Congregational Legacy Charity. This ministry would be funded through a legacy endowment provided by the congregation to the Catholic Health Sponsors of Ontario.

The Archbishop of Kingston, canon lawyers, and the Congregation for Institutes of Consecrated Life and Societies of Apostolic Life (CICLSAL) were kept abreast of the institute’s planning processes and decisions. The sisters noted that, in their formal meetings with the Archbishop of Kingston, the tenor of the Archbishop’s comments seemed to suggest his surprise that the congregation would have sufficient insight to appreciate the need for these reforms. This may reflect a disconnect between many religious institutes and their diocesan bishops. Bishops and religious institutes might share responsibility for this unfortunate reality. As a religious institute, due to aging personnel and dwindling resources, as well as transfer of its apostolates that were inherent to its identity to others, it may become a *persona non grata*. The question for both religious institutes and diocesan bishops might be what newness the charism of a particular congregation can continue to bring to a diocese in light of issues of limited personnel and financial resources.

In any significant organizational transformation, norms related to the transfer of ecclesiastical assets must be carefully followed.⁷² The archives of religious institutes are part of their patrimony.⁷³ In consultation with the Archdiocese, the archives of the Sisters of Providence of St. Vincent de Paul in Kingston will be included with diocesan archives, as well as the archives of the Religious Hospitallers of St. Joseph, hence becoming part of the faith legacy preserved by the Archdiocese of Kingston.

⁷⁰ See CATHOLIC CONGREGATIONAL LEGACY CHARITY (CCLC), at www.chco.ca/en/cclc.

⁷¹ CATHOLIC HEALTH SPONSORS OF ONTARIO (CHSO), “Our Legacy of Caring for the Vulnerable,” at www.chco.ca/en/home.

⁷² CANADIAN CONFERENCE OF CATHOLIC BISHOPS (CCCB), Decree 38: Maximum Amount for Alienation of Church Property,” 26-27 March 2019, at www.cccb.ca/site/images/stories/pdf/Alienationofchurchproperty2019.pdf.

⁷³ See VAN DAM et al., “Explorations,” 26.

2.3.2 — *The Ursuline Sisters of Chatham Union*

In 2012, the leadership team of the Ursuline Sisters of Chatham, Diocese of London, Ontario, began to research legacy options, a process they called “Blessing the Future.”⁷⁴ A committee was invited to engage the members of the community in exploratory discussions regarding the congregation’s future. From 24 May to 2 June 2013, active members of the Ursuline Sisters gathered at their general chapter and reflected on the future of the congregation, given aging members, diminishing numbers, and health needs of the members. The members indicated their desire to be proactive in planning for their future, while they had the energy and time to plan without undue pressure. On 18 December 2013, the Leadership Circle appointed the “Blessing the Future” Committee, which met monthly from 2014–2017. They also met with the Leadership Circle twice annually and provided reports to the entire congregation during five, day-long gatherings. The committee examined various canonical options for reconfiguration, including union, merger, federation, and covenant relationships.

The wisdom of this process lay in taking as much time as was needed to ensure planning processes were clear, and the community as a whole was offered an opportunity to participate. Large portions of the congregation’s historical apostolates and associated real estate had already been transferred to other canonical sponsors. Options for the use of real estate holdings were examined and included options to “do nothing,” sell Villa Angela and relocate the congregation, or sell Villa Angela to a healthcare provider and lease back property and services to meet the needs of the members. The members determined that the available canonical options of merger, union, federations, or covenant agreements with another religious institute were not appropriate for them at this time in their history. A decision was made that the congregation would stay together until its dissolution.

Ongoing governance of the congregation was a concern. Maintaining a Leadership Circle as long as possible was the preference, even though members were cognizant of the dwindling human resources available for this function in the future. A decision was made to develop an administrative council consisting of sisters and lay collaborators that will be adjusted at the point when a juridic person needs to be appointed by the sisters and the administrative council.

⁷⁴ See URSULINES OF CHATHAM, Decision-Making Process, email communication to B. MacLellan from T. Campeau, 22 July 2019, available in the private archives of the general superior, St. Joseph’s Motherhouse, 2025 Main St. W., North Bay, ON, P1B 2X6 (= private archives).

With canonical and civil legal consultation, a congregational “will” consisting of directions for distribution of ecclesiastical goods was developed. In keeping with the sisters’ mission and values, any financial assets remaining in the corporation when the last sister dies will be distributed to registered charitable organizations that support justice, especially for women and girls; advocacy and assistance for those most marginalized and vulnerable; and environmental and ecological concerns.

At their 2017 chapter, the sisters entered into a memorandum of understanding to record their agreement relating to the future of the congregation, the continuing care of the sisters, and the distribution of assets, particularly the motherhouse. In their agreement, the sisters approved the actions required for “winding up the corporation and for the completion of the community.” “The community will remain as a Religious Institute until the last Sister has passed away. When this happens, the canonical juridical person selected to assist in the administration of the Corporation and of the Community will inform the Holy See. Contemporaneously, the Corporation’s assets remaining at the time of completion will be distributed in accordance with civil law and in keeping with directives received from the congregation, and in compliance with any directives received from the Holy See. After distribution of the assets, the corporation will be dissolved and the Holy See will be informed.”⁷⁵ The memorandum of understanding is an expression of the sisters’ true intentions, which is in keeping with the congregation’s spirit of adapting to changing circumstances and which may be adjusted by a future gathering of sisters who are willing and able.⁷⁶

3 — *Additional Options*

Many religious institutes are diminishing in numbers and resources. This section considers several additional options, helpful agencies, and temporal good requirements for dealing with this diminishment that are in accord with canon law. One solution is to transfer some or most of an institute’s responsibilities to another public juridic person. Another option is to petition for an indult to transfer administrative responsibility to a lay board until all the members of the institute have died. A third involves various collaborative

⁷⁵ See T. CAMPEAU, “Oh, The Places You’ll Go!!” Legacy Planning Presentation, ATRI Conference, Toronto, 2018, Slide 10, as received in a private email to Bonnie MacLellan, 22 July 2019, private archives.

⁷⁶ See *ibid.*, Slide 11.

governance models. In all these models, an institute typically cedes to non-members some or all administrative responsibilities for their religious institute. This can precipitate fear among some of the members of the institute that complete strangers will be put in charge, or that these administrators will not respect the institute's religious nature and charism, so these concerns must be addressed if any of these options are chosen. There must also be safeguards for preserving the institute's just autonomy. Clear contractual language that outlines and limits authority and competency must be established.

3.1 — Alternate Public Juridic Person

A religious institute declining towards dissolution may make a gradual or complete transfer of canonical and/or civil administrative and apostolic responsibilities to the governing board of another public juridic person, such as another religious institute or an independent board of a new public juridic person.⁷⁷ If a new juridic person is chosen, the board could include members of the institute for whom it is assuming responsibility, as well as lay members. The major superior and council would be responsible for the personal interests of the members including those matters relating to vows, community life, and psychological, pastoral, and spiritual care. As in other models proposed, this is a temporary solution in which the new public juridic person is to assume full responsibility of the religious institute until the last member dies. The question of clarity between personal and material interests can be debated.

3.2 — Transfer of Administrative Responsibilities to Non-Members

Van Dam suggests that the option of delegating administrative responsibility to non-members "is the likely choice of most Religious Institutes in the relevant situation."⁷⁸ For diocesan institutes, the focus will be on particular juridic questions in light of the principles in cc. 586, 594, and 595. These canons emphasize the just autonomy of religious institutes and the diocesan bishop's special duty of care for religious institutes of diocesan right. McDermott clarifies that religious institutes of diocesan right are subject to the diocesan bishop in matters that exceed the competence of internal authorities.⁷⁹ The just autonomy of religious institutes can be preserved when members of the institute are still able to

⁷⁷ See VAN DAM et al., "Explorations," 18.

⁷⁸ *Ibid.*, 19.

⁷⁹ See McDERMOTT, "Norms," 760.

participate on leadership boards identified by the diocesan bishop to fulfill administrative functions in the name of the institute. For religious institutes of diocesan right, an administrative board can be appointed by the diocesan bishop and would report at least annually to him. The focus of such an administrative body is to promote the well-being of the remaining members of the institute and implement the wishes of the last chapter.

Given demographic realities, institutes of pontifical right will also find themselves at some point unable to elect general superiors or councillors from within the institute. Mergers and unions do not seem to be a practical option. Religious institutes must fulfill the following responsibilities: (1) assure their members that they will be protected; (2) provide good stewardship of resources; (3) ensure that personnel are hired to care for the sick and are well organized; (4) ensure that labour laws are respected; and (5) provide apostolic works to meet new needs.⁸⁰

One Canadian entity that may serve a significant benefit for religious institutes into the future is the Canadian Religious Stewardship (CRS). The CRS is a collaborative ministry established as a not-for-profit civil corporation in 2008 and as a public juridic person of pontifical right in 2010. The purpose of the CRS is to assist institutes of consecrated life and societies of apostolic life which request its services in the following ways: (1) managing and safeguarding its ecclesiastical temporal goods and ensuring their proper administration in accordance with canon and civil law; (2) providing personal care programs and services for the membership; (3) accepting ownership of ecclesiastical temporal goods in those instances where an institute wishes to divest itself of property, in accordance with the requirements of canon law; (4) when opportune, accepting governance responsibilities for any or all ministries other than healthcare ministries presently supported by the institute; and (5) with the consent of the diocesan bishop, and if appropriate, accepting sponsorship of a ministry of an institute.⁸¹ The CRS fulfills its mission through six pillars of service: (1) consultation services; (2) establishing and managing eldercare residences for religious; (3) oversight of the management of investment portfolios for religious institutes; (4) sponsoring the Foundation for Canadian Catholic Congregations, which owns, manages, and administers funds to further the apostolic ministries that have been served by religious in Canada; (5) providing administrative services to religious institutes; and (6) canonical sponsorship of Catholic apostolates.⁸²

⁸⁰ See MORRISEY, "Strategies for the Future," 29.

⁸¹ See "About CRS," at www.crsrc.org/aboutcrs.

⁸² See CRS Mission Pillars, at www.crsrc.org/ourservices.

Another helpful agency for religious institutes with healthcare apostolates is the Catholic Congregational Legacy Charity, which was created to support the future sponsorship needs of Catholic health care.⁸³ Its role is to support the sustainability of Catholic works and to improve the well-being of those at the margins of society. This includes preserving and safeguarding assets such as land, buildings, and investment funds. Given the synergistic missions of both the Canadian Religious Stewardship and Catholic Congregational Legacy Charity, discussions are underway to develop avenues of mutual collaboration and support between the two agencies.

3.3 — Collaborative Governance Models

Besides ceding responsibilities to another public juridic person or other administrative boards, other collaborative governance models are possible. This section examines the solutions reached by several religious institutes in North America.

In 2009, the Sisters of the Holy Family of Fremont, California numbered fifty-two members.⁸⁴ At this time, they made a decision not to accept new members but to maintain their separate identity as a religious institute instead of merging with another institute. They demolished their motherhouse and built cottages conducive to the condition of elderly persons. They endowed a new non-profit trust to preserve historically significant properties and make them available for public use. To ensure appropriate canonical governance, they signed a covenant agreement with the Sisters of the Holy Names of Jesus and Mary. When the Sisters of the Holy Family are unable to elect a Leadership Team, they will petition the Apostolic See for a “commissary,” or members of the Holy Name congregation who will provide care for the remaining Holy Family sisters.

The Sisters of the Most Precious Blood of St. Louis made a decision to stop recruiting new members because they had not had anyone make final profession in a number of years. They sold their motherhouse and infirmary, which were transformed into assisted living apartments and a skilled nursing home. Sisters living in the motherhouse became tenants in the apartments, and about half of the nursing home residents are sisters.⁸⁵ The Franciscan

⁸³ See CHCO, Catholic Congregational Legacy Charity, at www.chco.ca/en/cclc.

⁸⁴ See E. EISENSTADT EVANS, “As Recruiting Era Slows, Women Religious Reflect, Then Choose New Course,” in *Global Sisters Report*, 18 July 2019, at www.globalsistersreport.org/news/ministrytrends.

⁸⁵ See D. STOCKMAN, “Religious Communities Face Changes, Plan to Retain Missions and Preserve History,” in *Global Sisters Report*, 2 June 2016, at www.globalsistersreport.org/news/trends.

Sisters of Mary are located near the Sisters of the Most Precious Blood. The leadership of both institutes knew they could not solve their neighbour's problems, but they also knew that facing the shared problems of aging members and increasing costs would be to their advantage. A covenant relationship was proposed whereby both institutes would keep their separate identities in the eyes of the Church, but they realise that this is only a temporary solution before a further option will be necessary.

These communities were referred to Fr. Francis Morrissey and Sister Kelly Connors, both canonists who were developing collaborative governance models which focused on the civil corporations of the congregations involved. Each congregation would have two identities: one entity recognized by the Church under canon law and a non-profit corporation recognized in civil law. The civil corporations from the two communities create a third corporation which handles insurance, human resources, property management, legal issues, and other tasks the congregation requires as well as any management tasks needed for sponsored ministries. The institute's leadership is then free to focus on spiritual issues. The participating institutes appoint representatives to a new civil corporation's shared board and pay the corporation for services provided. When no one from the community is able or willing to serve on the collaborative corporation's board, they can appoint a vowed religious from outside the community as their representative. When there is no one from the institute who is able or willing to assume spiritual leadership of the congregation, a petition for appointment of a pontifical commissary as the leader, who could serve as the congregation's representative to the board or serve as board chair, would be made to CICLSAL. This model ensures care of the sisters until the last one dies. Communities and their respective civil corporations continue to own all of their assets, such as land and buildings, while the governance of the corporation manages the assets. When it is required, the board then provides leadership and carries out the congregation's wishes until completion. Each community contributes to the expenses of the corporate services provided.

3.4 — Safeguarding of Temporal Goods for Ecclesiastical Purposes

To ensure that the needs of the members of religious institutes are met throughout their lifespan and that the intentions of founders and donors are recognized and supported, institutes, be they of diocesan or pontifical right, may choose to develop a "testament." Canon 123 assumes that public juridic persons such as religious institutes include in their statutes a clause that addresses the destination of its property and proprietary rights, as well as its

obligations. In the absence of these directions in the statutes, the temporal goods and patrimonial rights and obligations are transferred to the juridic person immediately superior, without prejudice to the intentions of the founders and donors and acquired rights. Creation of a Congregational Will facilitates and ensures appropriate disposition of assets. Funds for future living costs should be segregated, with any remaining cash used for continuation of apostolates of the Church and the *caritas*, which reflects the charism of the institute.

To assist religious institutes in planning for the proper care and management of temporal goods, the Congregation for Institutes of Consecrated Life and Societies of Apostolic Life held two international symposia in 2014. Guidelines for reconfiguration, continuation of the charisms, and asset management were developed to assist religious institutes to continue to respond “with renewed courage and prophecy to the challenges of our times, and to continue to be a prophetic sign of God’s love.”⁸⁶ This information should assist both general superiors and diocesan bishops in shared planning endeavors, which would include the canonical responsibilities in relation to the temporal goods of a religious institute. It should encourage religious institutes to evaluate their economic realities in light of their charism to be “outposts of care for all the poor ... [and] examples in overcoming every form of egoism through the logic of the Gospel which teaches us to trust in the Providence of God.”⁸⁷

The resources of any religious institute are intended to be instruments to serve, not to govern.⁸⁸ Institutes will be called upon to make economic judgments in light of the congregation’s charism and mission, as well as the social and ecclesial implications of their decisions.⁸⁹ Profitability cannot be the only criterion to keep in mind.⁹⁰ As the Holy Father suggested, “I would

⁸⁶ CICLSAL, Circular Letter, Guidelines for the Administration of the Assets in Institutes of Consecrated Life and in Societies of Apostolic Life,” 2 August 2014, Libreria Editrice Vaticana; *EV* vol. 30, 908-921; and at www.vatican.va.

⁸⁷ FRANCIS, “Message to the Participants at The International Symposium on the Theme: ‘Management of Ecclesial Goods of Institutes of Consecrated Life and Societies of Apostolic Life at the Service of Humanity and the Mission of the Church,’” Rome, 8-9 March 2014, at www.vatican.va/content/francesco/en/messages/pontmessages/2014 (= FRANCIS, Message to Participants, 2014).

⁸⁸ See CICLSAL, Guidelines, *Economy at the Service of Charism and Mission*, Rome, Libreria Editrice Vaticana, 2018, no. 1 (= CICLSAL, *Economy at the Service of Charism and Mission*, 28).

⁸⁹ See FRANCIS, “Message to Participants.”

⁹⁰ See FRANCIS, Encyclical Letter on the Environment ‘*Laudato si*’, 24 May 2015, in *AAS*, 107 (2015), 847-945, English translation in *Origins*, 45 (2015-2016), no. 187.

hope that structures can be streamlined, large religious houses repurposed for works which better respond to the present demands of evangelization and charity, and apostolates adjusted to new needs.”⁹¹

4 — *The Role of Bishops*

The members of Canadian religious institutes have not been sitting idly awaiting the death knell to peal; they have been carefully and practically planning their future. One question this raises is whether this planning has been completed, for the most part, in isolation, with diocesan bishops being informed only when support for a congregation’s decision-making process is required by CICLSAL. Would a more collaborative process between the religious institute and diocesan bishop offer the institute a sense of being supported and affirmed? When examined objectively, the realities religious institutes are dealing with are not so different from issues the diocesan bishop faces on a daily basis: declining attendance at the liturgy, excessive property demands, lack of vocations, aging clergy, and mounting costs. For both religious institutes and dioceses, the balance sheets seem to be tilted towards human and financial bankruptcy. The saving grace in this assessment is that we are not discussing a purely human enterprise but one that has survived turmoil and chaos, through the grace of the Holy Spirit, for over 2000 years. What can be done to be attentive to the movements of the Spirit in our midst?

While the duties of diocesan bishops as they relate to religious institutes are noted in the law, it becomes more difficult to legislate the relationship between the diocesan bishop and religious institutes serving in his diocese. Religious institutes historically initiated and served in major diocesan apostolates of education, health care, and Catholic charities. For the most part, many bishops welcomed religious institutes that could coordinate and manage these apostolates on behalf of the Church, in fulfillment of its mission on earth. However, as religious institutes have recognized their own limitations as they relate to human and fiscal resources, they have transferred sponsorship responsibilities for many, if not most, of these apostolates to other sponsors, including public juridic persons. This has left little or no mission connection between diocesan bishops and religious institutes, other than occasional invitations to attend congregational celebrations of jubilees or funerals. To an observer, it would seem that some diocesan bishops serving in North American dioceses might have lost the memory of the gift

⁹¹ FRANCIS, Apostolic Letter *Scrivo a voi*, no. 4.

religious institutes have been in their dioceses. Many bishops are overwhelmed with issues related to clergy sexual abuse, clericalism, lack of vocations to the priesthood, shortages of personnel, and financial challenges. It is probably difficult, on a good day, to manage the daily crises the diocesan bishop must deal with, let alone consider the concerns of religious institutes in his diocese.

In his role, the bishop is responsible for both the spiritual life of the Church and its temporal goods.⁹² If the diocesan bishop is charged with the responsibility of ensuring the actualization of the mission handed down to the Church through Jesus and the apostles, what are his responsibilities to assist religious institutes to read the signs of the times and develop appropriate plans to continue to respond to God's grace? How might local chancery offices and episcopal conferences align themselves with religious institutes and walk hand in hand into the newness to which God is inviting us? Could bishops ensure the appointment of an episcopal vicar for consecrated life (c. 476) or some similar office, charged with ongoing dialogue between the diocese and religious institutes serving there? Could the Canadian Conference of Catholic Bishops, in consultation with CRC, re-establish the standing committee on consecrated life to examine the current reality facing religious institutes in Canada? As shepherds in their dioceses, how can bishops, individually and collectively, include in their mission support for religious institutes as they examine alternate configurations to support their continued presence in the Church's mission in new ways? The Church has begun to provide guidance on this front and has developed guidelines which could be considered a starting point for conversations with religious across the country, assisting them to be embraced by a Spirit of newness that will lead to a new freedom and renewed collaborative relationships of trust.

CICLSAL approved guidelines for diocesan institutes of consecrated life and societies of apostolic life when they can no longer find members able to fill governance positions because of reduced members or advanced age. (See Appendix Two.) The Guidelines note the important role of the diocesan bishop when this reality is faced by religious institutes in their diocese. Then, the role of the diocesan bishop becomes one of ensuring the spiritual and material needs of the members, the management of the works and the administration of goods, and the governance of the institutes. While these Guidelines were developed to deal with the needs of diocesan religious institutes

⁹² See FRANCIS, Apostolic Letter m.p. *Fidelis dispensator et prudens* for the constitution of a new structure of coordination of the economic and administrative affairs of the Holy See and the State of Vatican City, 24 February 2014, in AAS, 106 (2014), 164 ff., English translation in *Origins*, 43 (2013-2014), 649-650.

and societies of apostolic life in the Netherlands, they can, with appropriate adaptation, be equally as applicable to other diocesan and pontifical religious institutes throughout the world that may be experiencing comparable issues of declining membership and resources. Diocesan bishops may wish to consider sharing these Guidelines when discussing the future of religious institutes in their diocese with the leaders of these institutes. From this framework, diocesan bishops and religious institutes can begin to choose a future which is full of hope versus resign themselves to an imposed future.

Conclusion

Many if not most religious institutes and societies of apostolic life, or provinces of same in Europe and North America, are in the process of examining and evaluating their current vocational and financial realities. They have begun to develop new and creative models of charity through collaboration with experts and the creation of legal frameworks intended to best protect and promote the effectiveness of their ministries. The Church encourages religious institutes to link with centres of excellence to monitor and ensure appropriate canonical and civil legal structures to support the mission and collaboration with other religious institutes who share their charism and commitment to the mission. In addition, religious institutes, even those of pontifical right, liaise with diocesan bishops and episcopal conferences as appropriate, especially to coordinate their ministries.⁹³

“Our future lies in God’s gaze. We need [those] who, owing to [their] greater familiarity with the wide expanses of God’s field than with the confines of [their] own narrow garden, [are] able to assure us that what our hearts aspire to is not a vain promise.”⁹⁴ Our vision for the future rests in our capacity to dialogue with reality, to fit into the history of humanity, and to wait patiently for this vision to become a reality over time.⁹⁵

⁹³ See CICLSAL, *Economy at the Service of Charism and Mission*, 40.

⁹⁴ FRANCIS, Discourse at the Meeting of the Congregation for Bishops, 27 February 2014, at www.vatican.va/content/francesco/en/speeches/2014. See also IDEM, “Bishops Should Be Evangelists, Not CEOs,” in *Origins*, 43 (2014-2015), 665-669, no. 1.

⁹⁵ See CICLSAL, *Economy at the Service of Charism and Mission*, 44.

Appendix ONE

Questionnaire to Assist Planning by Religious Institutes

Source: SECRETARIAT OF THE CONFERENCE OF RELIGIOUS IN THE NETHERLANDS, "Questionnaire to Assist Religious Institutes with Obtaining an Overview of Their Present Situation and Making Arrangements for the Future," in C. VAN DAM, T. SPONSELEE, and A. LEYS, "Explorations on the 'Completion' of Religious Institutes," in *RCRI Bulletin*, 8 (2012), 23-29.

1. Purpose
 - a. What is the purpose of your institute as a religious community?
 - b. Are you able to achieve this purpose to a satisfactory extent?
2. Spirituality

How do you ensure a vibrant spiritual life among your members?
3. Pastoral Care
 - a. Is sufficient pastoral care available, also in the long term?
 - b. Do you have a priest specifically assigned to your community/communities, or a pastoral worker or someone like a hospital chaplain?
 - c. Do you celebrate the Eucharist on a daily basis? What happens if this is not possible due to, for example, lack of priests?
4. Management and Governance
 - a. Do you have a sufficient number of members who are suitable and able to fulfill the administrative and managerial positions? For how long will these people remain able to do so?
 - b. How old will these people be in eight or twelve years (another two terms of office)?
 - c. Do you have several people within your institute who are suitable and able to hold the position of superior or Major superior?
 - d. Is your institute governed from the US? Does your institute carry responsibility for houses abroad whilst not having a higher level of leadership abroad? What arrangements have been made for those houses in the future?
5. International Financial Relations
 - a. Do you manage some parts of your institute abroad, for example the generalate or other provinces? Do you look after the interests of parts of your institute in mission areas? If so, who is responsible?

- b. Do you expect any changes to this situation in the near future? If so, have you been sufficiently informed about the options and/or possible problems?

6. Novices

- a. Have you had any new entrants in the past ten years (i.e. persons who were interested in religious life and at least embarked on the novitiate)? How many people took perpetual vows and are these people still with the institute? What does mean for the future of your institute?
- b. Do you cooperate with other communities for the purpose of education and formation of your novices?

7. Apostolate

- a. Does your institute have its own 'works' (for example spirituality centre, social service ministry, school, health care ministry, infirmary, etc.)?
- b. Does your institute carry the responsibility for the management and governance of these apostolic works?
- c. Do you have plans to pass on the management and governance responsibility? If so, what do the plans comprise?

8. Accommodation and Care

- a. Is the future care and accommodation of your members a topic of debate in your Religious Institute?
- b. Have you made arrangements for the accommodation of your members, for instance in a religious care home (including specialized care in the case of members with for instance, dementia)? Do you have any such agreement in writing and is it regularly updated?
- c. Do you expect to have to close or sell houses/buildings in the future? Whom would you ask for advice in case you wish to sell property? Do you know real estate agents specialized in selling monasteries?
- d. Do you intend to keep ownership of your own house for as long as possible, or are you considering renting accommodation?
- e. Are any of your buildings listed on the historical register or would any be eligible for this status? Which consequences does this have for you?

9. Finance

- a. Do you carry direct responsibility for the financial administration, or have you 'outsourced' this to for instance, the finance office of another, perhaps bigger Religious Institute?

- b. Do you use a budget? Do you feel that a budget is a useful administrative instrument?
 - c. Does the Board find the financial reports user-friendly and clear, or should they be more transparent?
 - d. Do you deploy an external accountant to audit the annual statement of accounts?
10. Investments
- a. Has part of your capital been invested?
 - b. Which objectives/profile have you defined for your investments and have you concluded an agreement concerning risks, etc. with a bank or investment broker?
 - c. Did you lay down in writing the general conditions for the investment portfolio?
 - d. Who is your investment adviser? Why do you use just one person? Is this person subject to assessment/supervision/control?
11. Reserves
- a. Which amounts have been set aside in the annual accounts for reserves? These may include:
 - b. Reserves for living costs;
 - c. Reserves for additional personnel in the future (caretakers, gardeners, secretaries for the leadership, bookkeepers, etc.);
 - d. Reserves for building maintenance.
 - e. Have these reserves been laid down in writing as decision from the Board and do you check regularly whether the provisions are still sufficient or whether adaptations are needed?
12. Archives, Art, Cemetery
- a. What is the situation regarding your archives? Have you developed plans for the archives? To whom should they go when your institute no longer exists? Have you considered moving them to a central archive?
 - b. Does your institute possess works of art? Do you have an inventory of the art works and do you know their historical and/or financial value?
 - c. Do you own your own cemetery? What will happen to your cemetery in the future, for example when the adjacent house has to be sold? Who will take care of it when all the members of the order have passed away?

13. External Support

- a. Do you have plans for a future “merger” (or other form of close collaboration) with one or more neighboring provinces? On which grounds was the decision taken not (yet) to do this?
- b. Do you expect support from your general Board or other provinces when the time has come that you will no longer be able to carry management and governance responsibility?
- c. Do you expect spiritual or management support from your “religious family” (for example the Franciscan, Carmelite, or Benedictine family)? Are these persons/Institutes aware of the fact that you are expecting such support?
- d. Do you hope to receive some form of external support, but do you not yet know from where or from whom? Have you made plans to, for example, set up a management foundation, outsource part of the work, or delegate managerial powers?

14. Relations with the diocese

- a. Does the diocese carry formal responsibility for your institute?
- b. Does the diocese show an active interest in your institute? Do you maintain contact with the person who is responsible for religious orders? Do you submit your annual accounts to the diocese (for diocesan Religious Institutes)?

15. Position of Laity

- a. Do you deploy lay persons as advisors to the leadership of your institute, or are you considering this option?
- b. Do lay persons carry out “managerial tasks” in your community/communities?
- c. How do you view your position as an “employer” of lay persons, in particular of those in “core positions” such as coordinator and pastoral worker? Do you foresee that fulfilling this duty may become difficult for you in the near future?

16. Important documents

- a. Does your institute have some form of document that outlines your wishes concerning what should happen with the assets after the dissolution of your institute (for instance the generalate, the diocese, and associated institute, or a particular project)? For example, it may be the purpose that part of the assets should be donated to a Religious Institute in an African or Asian country,

yet should be managed in your country (for example for reasons of inflation): if so, have you made arrangements for this?

- b. Are you prepared in due course to place copies of the Constitutions, the Regulations on Proprietary Rights, bylaws of companies and other documents that may be of importance in the final stage of an institute with the Conference of Religious/of Major superior for safekeeping?

17. General

Do you expect that you may need support in a particular area shortly? How can the Conference of Religious/of Major Superiors be of help to you?

Appendix TWO ***Guidelines of the Holy See for*** ***Institutes and Societies Facing Completion***

These Guidelines were approved *ad experimentum* for five years by the Congregation for Institutes of Consecrated Life and Societies of Apostolic Life, 2 March 2015, for use by religious institutes and societies of apostolic life of diocesan right in the Netherlands, published in Ad LEYS, “Structuring ‘Completion’ of a Religious Institute: Some Canonical Provisions,” in *The Jurist*, 76 (2016), 447-487.

The heading “Guidelines of the Holy See for Institutes and Societies Facing Completion” is an editorial contrivance of *Studia canonica*. The official title, too cumbersome for a heading, is “Guidelines for the Governance and Administration of Goods of Diocesan Institutes of Consecrated Life and Societies of Apostolic Life with the Principal House in the Netherlands, When They Can No Longer Find Members because of Reduced Numbers or Advanced Age.” The original text is this English version.

Preamble

“A true autonomy of life, especially of ‘governance’, is recognized for each institute of consecrated life and society of apostolic life, by which it “has its own discipline in the Church and can preserve whole and entire the patrimony described in can. 578” (c. 586 § 1). This is an important reality that local Ordinaries are called “to preserve and safeguard” (c. 586 § 2).

This autonomy, which is not absolute, is to be exercised and interpreted in the light of the contents of cc. 578, 593 and 594 and of the Apostolic

Exhortation *Vita consecrata*, nos. 48 and 49. There are also some situations in which the exercise of “true autonomy” becomes difficult or impossible. Such is the case for institutes of consecrated life or societies of apostolic life that, because of a marked reduction in numbers or very advanced age, are no longer able to exercise ordinary governance through the celebration of the General Chapter and the election of the Supreme Moderator and the members of the Council.

These guidelines are to be followed in such circumstances, with due regard for the situation of each institute (diocesan institute of consecrated life or society of apostolic life), in order to ensure the spiritual and material needs of the members, the management of the works and the administration of the goods and the governance of institutes of consecrated life and societies of apostolic life of diocesan right whose principal house is in the Netherlands.

Norms

1. Only the members can validly take part in the government of any institute. Further conditions found in the institute’s proper law or other prescriptions of canon law must be fulfilled (cf. c. 623).
2. If the Institute no longer has any member able to fulfil the responsibilities of the General Treasurer, as an exception the Supreme Moderator with the consent of the Council, in accordance with the requirements of proper law (cf. c. 636 § 1), can entrust the duties of the Treasurer to a religious or lay expert who is not a member of the Institute, to administer the temporal goods of the Institute under the guidance and responsibility of the Supreme Moderator and the Council. If this exceptional provision is not already included in the Constitutions, it must be approved by the Bishop of the principal house and need be inserted into the constitutional text.
3. If members of the Council are no longer able to carry out the Council’s financial responsibilities, the Bishop of the principal house, at the request of the Supreme Moderator, with the consent of the Council, may appoint at least two experts who will carry out the duties of the Council regarding the administration of goods and material care of the members of the Institute. These duties must be outlined clearly by the Bishop of the principal house in the letter of appointment, taking into consideration the provisions of the Institute’s own law. The appointment is made for a specific term and can be renewed. The persons to be appointed must be Catholic, outstanding in the evidence

of their faith, probity of life, honesty, prudent advice, knowledge of the Institute and with proven administrative skills.

4. If there are no longer any members, or there are insufficient members who can participate in the Council, the General Chapter will notify the Bishop of the principal house. In consultation with the Supreme Moderator and consulting the other Bishops involved, he can appoint one or more religious assistants, who will act as a Council in order to assist the Supreme Moderator.
5. In the same way, when there is no longer any suitable member able to hold the office of Supreme Moderator, the General Chapter will inform the Bishop of the principal house. After consulting the members and the other Bishops involved, he will appoint a Commissioner or General Administrator whose role is to govern the Institute. If there are well-founded doubts about the real possibility that any member of the Institute could take on the office of government, the Bishop, after carrying out an appropriate canonical visitation (cf. c. 618 § 2, 2°), carefully evaluating the whole matter, can proceed *ex officio* to appoint a Commissioner or General Administrator.
6. The Commissioner or General Administrator governs the Institute with the authority that the universal law and the Constitutions give to the Supreme Moderator and the Council of an Institute and in accordance with the decree of appointment. In particular, it will be his or her duty to provide for all the spiritual and material needs of the members, to protect the patrimony of the Institute mentioned in c. 578, and to safeguard its temporal goods. The Commissioner or General Administrator will inform the members about the progress of the Institute and will listen to their opinions on matters of major importance.
7. The Commissioner or General Administrator must be a religious man or woman, or a secular cleric with a good understanding of religious life, who has an affinity with the Institute as far as possible and who is endowed with proven governmental and administrative skills. For Institutes of women, preferably a woman religious should be appointed. The Commissioner or General Administrator is appointed for a fixed term of office. While assessing the functioning of the Commissioner or General Administrator at the end of the term, the Bishop of the principal house will involve the members of the Institute in an appropriate way. In financial administrative matters, the Commissioner can use the assistance of one or more competent experts, with the prior written consent of the diocesan Bishop. The Commissioner or General

Administrator must keep the members informed and will listen to their opinions on matters of major importance.

8. When the Bishop of the principal house has appointed financial experts (cf. no. 3) or a Commissioner/General Administrator, the annual financial statements and budget plans of the Institute must be presented for his approval. Before approving them, he will have them evaluated by the Finance Council of the diocese.
9. The Commissioner or General Administrator (cf. no. 5) must obtain the prior written permission of the Bishop of the principal house for the validity of acts which exceed the limit and manner of ordinary administration. Should the proper law of the Institute not contain such provision, reference is to be made to the norms of cc. 638 §§ 2-4.
10. When the Bishop of the principal house has appointed financial experts (cf. no. 3) or a Commissioner or General Administrator, he will first establish norms requiring compliance with universal and proper law concerning the use and ecclesial objectives of the Institute's goods. The Bishop of the principal house may establish a maximum limit for donations (cf. nos. 15 and 16). It will be his duty to take care that donations given by the Institute are in accord with the proper purposes of ecclesiastical goods (cf. c. 1254 § 2).
11. Ordinarily, any non-member who has a role in the Curia of the Diocese of the principal house cannot concurrently be the Commissioner or General Administrator (cf. no 5), or perform any other role of governance in an Institute (e.g. Treasurer, financial expert [no. 3], or religious assistant [no. 4]).
12. Non-members with governance or administrative responsibilities in the Institute (Commissioner or General Administrator, Treasurer, financial expert, religious assistant) will terminate their service when they reach seventy-five years of age, notwithstanding the possibility of an extension which may be granted by the competent authority.
13. The goods of the institute are ecclesiastical goods and are subject to the provisions of Book V of the Code of Canon Law, to the observance of cc. 634-640 and to the proper law of the Institute, in accordance with c. 635 § 2. These goods are reserved for the fulfillment of the Institute's charismatic purposes, for the appropriate support of the members and for its proper apostolic and charitable works (cf. c. 1254 § 2; AA 2).
14. To avoid any appearance of luxury, excessive gain and the accumulation of goods (cf. 634 § 2 and c. 640), when real property is no longer needed or for another just reason (cf. c. 1293 § 1, 1°), the

Institute can alienate it or donate it only after receiving the permission of the competent authority, in accordance with the provisions of universal and proper law (cf. c. 638).

15. For pious purposes or Christian charity (cf. 1254 § 2 and 1285) it is permitted to make donations of moveable goods which do not belong to the stable patrimony of the Institute, but only within the limits of ordinary administration. The proper law of the Institute must establish who is authorized to make donations within these limits.
16. Donations to individual persons and to non-ecclesiastical institutions with shared goals and which are also supported by ecclesiastical institutions must be limited in number and proportion. These non-ecclesiastical institutions must not have any purposes which might be contrary to the magisterium of the Church.
17. When a General Chapter approves resolutions regarding “the arrangements for the goods and patrimonial rights” of the Institute (cf. c. 123) which involve a change or extension of the constitutions, such resolutions require the approval of the Bishop of the principal house (cf. c. 595 § 1).
18. If the Institute extends to more than one diocese, the Bishop of the principal house must consult with the other diocesan Bishops before proceeding to the appointment of persons who are not members of the Institute (General Treasurer, financial experts, religious assistants, Commissioner, or General Administrator) or otherwise dealing with matters of major importance concerning the whole Institute.
19. The Commissioner or General Administrator will take care to settle all financial affairs and obligations of the Institute after the death of the last member of the Institute, until the formal dissolution of the Institute or Society by the Holy See (c. 584). He or she will deliver, within a period determined by the Bishop, his/her final report to the Bishop of the principal house.

RÉFORMER LES INDULGENCES

TENTATIVES DU PAPE PAUL VI

JEAN-CLAUDE AGBEKO KOMLA MENSAH

RÉSUMÉ — Pendant le Concile Vatican II, le pape Paul VI introduisit, *motu proprio*, un projet pastoral de réforme de la discipline des indulgences. Présenté aux pères conciliaires sous forme d'un document appelé *Positio*, ce projet a été critiqué par certains de ces pères qui ont rappelé les présupposés du malaise qu'a suscité la discipline des indulgences dans l'Église depuis des siècles, et qui ont également regretté que la *Positio* n'a pas tenu compte suffisamment de l'évolution des recherches historiques, culturelles, théologico-canoniques et œcuméniques. Devant les positions d'évêquats locaux, du patriarche grec-melkite Maximos IV Saigh (Syrien), du Cardinal Allemand Julius Döpfner, et du Cardinal Hollandais Bernardus Johannes Alfrink, à l'encontre de la *Positio* et, pour éviter que le Concile devienne un colloque incertain, le pape Paul VI fit retirer la *Positio*, sans abandonner sa propre recherche d'une réforme de la discipline des indulgences. C'est dans cette perspective que le pape Paul VI va engager l'Église catholique latine dans des tentatives de réformes des indulgences entre 1965 et 1978, lesquelles se continueront ensuite, et sous le pontificat de François (Bulle : *Le visage de la miséricorde*, 2015).

SUMMARY — During the Second Vatican Council, Pope Paul VI introduced, *motu proprio*, a pastoral project to reform the discipline of indulgences. Presented to the conciliar fathers in the form of a document called the *Positio*, this project was criticized by some of these fathers who recalled the malaise in the Church which the discipline of indulgences had incited for centuries, and who also regretted that the *Positio* did not take sufficient account of the development of historical, cultural, theologico-canonical, and ecumenical research. Criticism of the *Positio* was levelled by local episcopates, the Greek-Melkite Patriarch Maximos IV Saigh (Syrian), the German Cardinal Julius Döpfner, and the Dutch Cardinal Bernardus Johannes Alfrink. To avoid uncertainty in the Council, Pope Paul VI had the *Positio* withdrawn, without abandoning his own search for a reform of the discipline of indulgences. It is in this perspective that Pope Paul VI would engage the Latin Catholic Church

in attempts to reform indulgences between 1965 and 1978, which reform would continue thereafter, and under the pontificate of Francis (Bull, *The Face of Mercy*, 2015).

Introduction

Dans le cadre du vaste dossier des indulgences, que nous avons étudié, d'abord dans un cycle doctoral de 2011 à 2016 à Paris (*cf.* note 6), puis en vue d'un colloque universitaire tenu à Paris et à Lille en 2016, en 2017 et en 2018¹, nous avons été sollicité par les organisateurs de ce colloque pour évoquer, comme le présent article l'atteste, le document de proposition pontificale de réforme de la discipline des indulgences, appelé *Positio*, commandité par le pape Paul VI, qui date de 1965. Ce document pontifical avait été rédigé pour tenter une réforme des indulgences. Ce texte avait commencé à être évoqué à l'initiative du pape Paul VI pendant les dernières semaines de la tenue du Concile œcuménique Vatican II. Mais ce projet de réforme, présenté *in extremis* à ce Concile, a dû être retiré par le pape lui-même (*voir infra*).

Les indulgences se forgent, puis s'affirment à travers des époques où a grandi la conviction de l'Église catholique romaine dans sa tradition latine, selon laquelle les indulgences se fondent sur les *mérites du Trésor de grâces obtenues par le Christ, par la Vierge Marie et par les Saints* (Formule dogmatisée)². La discipline des indulgences existant encore en 2020, le droit canonique liturgique catholique latin la définit ainsi : « L'indulgence est la remise devant Dieu de la peine temporelle due pour les péchés, dont la faute est déjà effacée, que le fidèle bien disposé, et à certaines conditions définies, obtient par le secours de l'Église qui, en tant que ministre de la Rédemption, distribue et applique avec autorité le Trésor des satisfactions du Christ et des saints » (c. 992)³.

Le présent article abordera les aspects suivants : (1) prémices exploratoires, au XX^e siècle, de la réforme pontificale contemporaine des indulgences : le pape Paul VI en 1965 ; (2) initiative concrète du pape Paul VI

¹ Le premier colloque s'est tenu à l'Université de Lille le 25 novembre 2016, le suivant a eu lieu à l'Université Paris-Nanterre le 24 novembre 2017 et le dernier a eu lieu à l'Université de Lille le 22 juin 2018.

² Dogmatisation dès le XIV^e siècle : CLÉMENT VI, Bulle jubilaire « Unigenitus Dei Filius », 27 janvier 1343 ; *cf.* DENZINGER, *Symboles et définitions de la foi catholique* (Peter HÜNERMANN, dir. de l'édition française), Paris, Cerf, 1996, §§ 1025 à 1027, 339-340 (Bulle promulguée en vue du jubilé de 1350).

³ *Code de droit canonique* (latin) de 1983.

en 1965 de faire présenter, au Concile Vatican II, une proposition réformatrice (la *Positio*), mais encore très classique, du dossier des indulgences ; (3) face aux réactions de certains pères conciliaires, le pape Paul VI fait cesser le débat naissant sur les indulgences ; (4) rappels des grands présupposés du malaise que suscitent les indulgences depuis des siècles, et spécialement lors de la protestation de Martin Luther en 1517 ; (5) retour sur la *Positio* de 1965 commanditée par le pape Paul VI : pour un approfondissement du premier essai concret, à partir du XX^e siècle, de réforme pontificale des indulgences ; (6) critiques épiscopales en 1965 à l'encontre de la *Positio* ; (7) quelques éléments du contenu du document de la *Positio*.

1 — *Prémices exploratoires au XX^e siècle*

Comme le rapporte en 2005 le théologien Peter Hünermann⁴, des évêques ont écrit au pape Jean XXIII pour la préparation du Concile Vatican II entre 1959 et 1962. Et certains de ces évêques ont émis des souhaits pour : « que l'ensemble de la question des indulgences fasse l'objet d'une nouvelle réglementation [...]. Ces vœux avaient été provoqués surtout par la forte augmentation des indulgences plénières – encore sous le pape Pie XII – et par la multiplication des autres indulgences »⁵. Nous tenons à souligner que le pape Paul VI, le 24 juillet 1963, confie, pendant le Concile Vatican II, à la Curie romaine – et non au Concile Vatican II directement – la formation d'une commission pour préparer une réforme des indulgences.

Nous nous appuyons sur notre propre thèse de doctorat soutenue le 6 décembre 2016 à l'Université Paris-Saclay et avec l'Institut catholique de Paris⁶. Nous précisons dans notre thèse que cette commission curiale était présidée par le Cardinal Cento, Grand Pénitencier. Cette commission curiale – composée de membres et de consultants de la Pénitencerie apostolique et de quelques théologiens romains – est confirmée par le pape Paul VI le 14

⁴ Cf. Peter HÜNERMANN, « La discussion autour des indulgences », dans Guiseppe ALBERIGO (dir.), *Histoire du concile Vatican II* (IV^e session et la conclusion du concile), Paris & Louvain, coéd. Cerf & Peeters, 2005, 460-469 (= HÜNERMANN, « La discussion autour des indulgences »).

⁵ *Ibid.*

⁶ Jean-Claude Agbeko Komla MENSAH, *Canonicités des indulgences et pastorales de la miséricorde*, Thèses d'Histoire du Droit et de Droit canonique, co-dirigée par le Pr François Jankowiak et par le Pr Jean-Paul Durand, Faculté de Droit Jean Monnet de l'Université Paris-Saclay et Faculté de Droit canonique de l'Institut catholique de Paris, 2016, 843 pages (dactyl.), à paraître aux Éditions du Cerf à Paris (= MENSAH, *Les indulgences*). Voir aussi IDEM, « Indulgence et miséricorde », dans *L'Année canonique*, 58 (2017), 265-277.

janvier 1964. Cette commission curiale a tenu ses diverses séances de travail entre le 24 janvier et le 28 octobre 1964. Les résolutions approuvées par la majorité des membres de cette commission sont recueillies dans un schéma pour être incluses dans les actes des réunions plénières de cette commission. Ainsi a-t-on abouti à un document appelé *Relatio*. Cette *Relatio* est remise au pape Paul VI qui l’a étudiée personnellement, et qui l’a soumise ensuite au théologien suisse Charles Journet qui deviendra Cardinal le 22 février 1965. Ce dernier s’est déclaré satisfait du travail accompli par cette commission. Néanmoins, en raison de la complexité et de la délicatesse du dossier des indulgences, ainsi que des problèmes inhérents à cette institution du droit canonique liturgique catholique romain latin – une institution qui n’est pas un sacrement, mais qui est tout de même un sacramental – le pape Paul VI décide d’agir avec prudence.

Le pape Paul VI va prendre une initiative totalement personnelle. À ce propos, Peter Hünemann, pour sa part, écrit en 2005 que le pape décide de consulter les évêques⁷. Par ailleurs, le pape fait aussi rédiger, par la même commission curiale, une version plus concise et distincte de la *Relatio*. La commission curiale révisé sa *Relatio* à laquelle elle donne le nom de *Positio*⁸, document que nous évoquons dans le présent article. La *Positio* est transmise aux présidents des conférences épiscopales le 15 octobre 1965 et non pas directement au Concile Vatican II.

2 — Initiative concrète du pape Paul VI en 1965

Le pape Paul VI fait dire au Concile Vatican II, le 29 octobre 1965 par le Secrétaire général de ce Concile, le Cardinal Pericles Felici, qu’il donne son accord pour faire lire [au Concile Vatican II] les réponses que donneront les présidents des conférences épiscopales à la *Positio*. Il ne faut pas confondre les réactions et opinions des présidents des conférences épiscopales ayant lu la *Positio* envoyée pour eux par le pape d’une part, et d’autre part le texte de la *Positio* : cette *Positio* ne représente pas un texte du Concile, mais le document a pu circuler au Concile lui-même. Comment faire état des opinions et réactions des présidents de conférences épiscopales ayant reçu la *Positio* ? Nous savons que le pape Paul VI a autorisé le Cardinal Felici à faire lire au Concile Vatican II les réponses qu’allaient donner les présidents des conférences épiscopales à propos de la *Positio*.

⁷ HÜNNERMANN, « La discussion autour des indulgences », 460-469.

⁸ *Ibid.*

Nous savons aussi que trois de ces présidents ont pris la parole de manière critique en assemblée plénière du Concile Vatican II (voir *infra*, la section 6 du présent article).

3 — *La fin du débat naissant sur les indulgences*

Nous savons que les autres présidents des conférences épiscopales ne pourront pas lire à leur tour leur texte et seront invités par le Cardinal Felici à envoyer leurs textes respectifs au pape, car le climat du débat suscité par les trois premiers discours critiques⁹ conduit le Cardinal Felici, au nom du pape, à mettre un terme à ces prises de paroles et au débat sur les indulgences le 13 novembre 1965. Le Cardinal Felici a déclaré :

On me demande pourquoi le secrétaire parle tant. Vous pouvez croire que je préférerais me taire, car c'est dans le silence qu'on trouve Dieu, mais il ne saurait suffire pour accomplir mon office. Presque jamais le secrétaire général (*du Concile Vatican II*) ne parle en son nom propre, sauf quand il parle plaisamment. Comme vous le voyez, la lecture des textes à voter suffit à occuper le temps des Congrégations générales [*ou séances plénières du Concile*]. Il en sera de même la semaine prochaine. En conséquence, il est impossible de poursuivre la lecture des interventions sur les indulgences. À ce sujet, il faut se souvenir que la Sacrée Pénitencerie n'a pas reçu mandat de proposer une réforme pratique. C'est là-dessus seulement que les présidents des conférences [*épiscopales*] ont été invités à prendre position. Certains d'entre eux ont néanmoins soulevé des problèmes doctrinaux. Il faudra sans doute en tenir compte, mais dès maintenant, des réserves seraient à faire sur quelques points¹⁰.

Formons l'hypothèse – et que l'histoire éclairera grâce à l'ouverture en cours des archives – que ce coup d'arrêt donné par le pape Paul VI *via* le Cardinal Felici, à la lecture par chacun des présidents des conférences épiscopales de leurs propres réactions à la *Positio*, a empêché les pères conciliaires d'entendre les présidents, à l'exception des trois premiers présidents orateurs, dont nous allons évoquer les propos. Mais avant cela, nous allons faire un rappel du fond du problème lui-même du dossier des indulgences, dossier si difficile qui a occasionné cette crise en novembre 1965. Tout au plus, le texte lui-même de la *Positio* a effectivement dû circuler au Concile, mais sans qu'un débat puisse s'y nouer.

⁹ Cf. *infra*, point n° 6.

¹⁰ René LAURENTIN, *Bilan du concile*, Paris, Seuil, 1966, 141-142 (= LAURENTIN, *Bilan du concile*).

4 — *Rappels des présupposés du malaise concernant des indulgences*

Nous savons que les indulgences apparaissent au XI^e siècle en contexte seulement latin, contexte ecclésial qui s'est séparé de Byzance en 1054. La première indulgence, la plus connue, est celle de 1095 édictée en France à Clermont par le pape français Urbain II (1088-1099) à l'occasion du lancement de la première croisade qui dura de 1096 à 1099. Le phénomène des indulgences s'enracine dans un contexte historique plus ancien encore ; il nous faudra donc évoquer la notion de peine temporelle qui remonte à des époques non chrétiennes, entre autres aux civilisations juives, grecques et romaines. Et ce n'est qu'en 1343, sous le pontificat de Clément VI (1342-1352), que l'institution des indulgences reçoit un fondement dogmatisé¹¹, dont nous allons rappeler brièvement les termes.

En tout cas, cette institution va connaître de tels abus financiers, par un commerce des indulgences, que l'Église catholique latine a cherché, d'abord en vain, à les corriger comme au Concile de Latran V (1512-1517). Il faudra la protestation véhémement de Martin Luther à partir de 1517 pour provoquer une crise ouverte concernant la pratique des indulgences. Certes, dès la fin du Concile de Trente en 1563, les autorités catholiques latines interdisent les abus. Néanmoins, il faudra attendre le XX^e siècle, dans la mouvance du Concile Vatican II (1962-1965) et par le pontificat de Paul VI (1963-1978), pour que l'Église catholique – dans sa dimension latine et dans ses dimensions orientales – s'engage à affronter résolument la difficulté, non seulement disciplinaire mais aussi doctrinale, des indulgences. Et c'est surtout à partir du 21 novembre 1964 que le Concile Vatican II et le pape Paul VI engagent enfin l'Église catholique romaine toute entière, dans une démarche œcuménique. Or, comment dialoguer et s'entendre avec les Églises protestantes issues notamment de Martin Luther, sans affronter le dossier doctrinal et pastoral des indulgences ?

4.1 — Les peines temporelles et leur christianisation

Il est très difficile de rendre compte, en quelques lignes, de plusieurs siècles ou millénaires d'histoire. Nous pouvons tout de même oser écrire ceci : au cours de périodes de l'antiquité pré-chrétienne (périodes grecque,

¹¹ Cf. Peter HÜNERMAN (dir. de l'édition française), DENZINGER, *Symboles et définitions de la foi catholique*, Paris, Cerf, 1996, §§ 1025 à 1027, 339-340 (Bulle promulguée en vue du jubilé de 1350).

latine et juive, visitées par nos soins), les actes mauvais, réputés avoir déstabilisé un certain ordre du monde, étaient censés devoir donner lieu à réparation, afin de contribuer à rétablir cet ordre ainsi violé, ou au moins, étaient censés devoir faire expier d'une peine le ou les coupables d'un tel affront ayant porté atteinte à cet ordre du monde. Notre thèse évoque les conditions dans lesquelles les peines temporelles anté-chrétiennes ont été christianisées¹².

4.2 — Dogmatisation doctrinale des indulgences

En effet, l'étude institutionnelle du dossier des indulgences a exigé que nous explorions l'environnement historique le plus large qu'il m'était possible d'entreprendre. Nous allons souligner ce qui a pu précéder cette crise du XVI^e siècle, avec ce point nodal au XIV^e siècle pour ce dossier des indulgences qui a consisté à la dogmatisation du *Trésor des Mérites du Christ, de la Vierge Marie et de tous les Saints*, en vertu de la bulle jubilaire *Unigenitus Dei filius* du pape Clément VI de 1343.

Depuis la nuit des temps, comme nous l'avons mentionné au début de cet article, en rappelant l'existence fondamentale des peines temporelles—non chrétiennes, puis chrétiennes (*cf.* note 2)—l'étude des indulgences nous a toujours conduit vers les notions de culpabilité, de peines à purger et d'interrogations sur les conditions de la miséricorde divine. Le christianisme, tant en Orient qu'en Occident, s'est inscrit très tôt dans une démarche spirituelle et institutionnelle des suffrages, c'est-à-dire des dévotions priantes à adresser à Dieu afin de l'infléchir pour qu'il veuille accorder sa miséricorde¹³. Cette démarche de supplications ou de suffrages suppose—comme le développera l'Église latine—de pouvoir s'appuyer sur *le Trésor de l'Église*, afin d'y puiser des grâces de soutiens, d'intercessions et de recommandations auprès de Dieu.

4.3 — La protestation de Martin Luther

Il est connu que le motif le plus explicite de l'affichage protestataire des quatre-vingt-quinze thèses par Martin Luther (1483-1556) le 31 octobre 1517

¹² MENSAH, *Les indulgences*.

¹³ Cette démarche des suffrages visant à infléchir la justice de Dieu a soulevé, *a fortiori* plus encore avec la Réforme protestante, de considérables polémiques dans la chrétienté à propos de la tension conflictuelle entre la gratuité de la grâce divine et la part méritoire de l'action du pécheur. Ce qui renvoie à l'histoire des théologies chrétiennes de la grâce et des mérites.

portait sur les indulgences¹⁴. Il est aussi admis par les historiens que des réformes de l'Église catholique romaine, bien que lancées avant la protestation de Martin Luther, peinaient gravement à aboutir, comme celles, en de nombreux domaines, que tenta de promulguer le Concile général de Latran V (1512-1517). Ce Concile, précisément, n'a pas du tout traité du dossier des indulgences ; alors qu'elles avaient été déjà fermement et publiquement critiquées par Jean Wiclif (1324-1384) et par Jean Huss (1370-1415).

5 — *Retour sur la Positio de 1965*

En effet, la codification latine de 1917, bien qu'elle a cherché à rendre la pastorale des indulgences plus proche des fidèles, en était restée aux affirmations doctrinales classiques réaffirmées par le Concile de Trente. Quant à la *Positio* proposée en vain, juste avant la fin du Concile Vatican II par le pape Paul VI en 1965 pour tenter un ajustement pastoral des indulgences, le contenu de son texte n'a pas su s'ouvrir suffisamment au débat alimenté depuis des siècles par le malaise occasionné par l'administration des indulgences. Nous en avons analysé les termes dans notre thèse¹⁵. Si une réforme catholique des indulgences a fini par débiter, c'est à notre avis, de manière fort tardive, à lire les documents que nous avons consultés quant aux pontificats successifs qui sont à considérer pour cette réforme, précisément entre le pontificat de Pie XII (1939-1958) et les débuts de celui de François (2013).

6 — *Critiques épiscopales en 1965*

Nous venons de dire que le Concile Vatican II est invité par le pape Paul VI en 1965 à écouter en assemblée plénière chaque président de conférence épiscopale, afin de donner à tout le Concile lecture de la réflexion de chaque conférence épiscopale sur la *Positio* envoyée par le pape lui-même. La *Positio* de 1965 n'a visiblement pas suffi à répondre au malaise des uns et à l'embarras des autres pères conciliaires à propos des indulgences. Mais à notre avis, ce document a occasionné indirectement un événement conciliaire

¹⁴ Cf. MENSAH, *Les indulgences*, en particulier pour la controverse en 1517 entre Martin Luther et le pape Léon X à propos des indulgences (337-392). Et cf. Nicole LEMAÎTRE et Marc LIENHARD (dirs.), *Renaissance et réformes*, Paris, Cerf, 2010 (Anthologie dirigée par Laurent Bernard).

¹⁵ MENSAH, *Les indulgences*.

inattendu et dont il faudra encore davantage étudier les conséquences : restent en effet très mémorables les réflexions, en pleine *aula* conciliaire, à propos de cette *Positio*, de la part des trois premiers orateurs prévus au nom, soit de leur synode patriarcal, soit au nom de leur conférence épiscopale. Ce sont, tout à tour, le patriarche oriental grec-melkite Maximos IV Saigh, puis le cardinal Julius Döpfner et enfin le cardinal Bernardus Johannes Alfrink.

6.1 — Déclaration du patriarche Maximos IV Saigh

À propos de la *Positio* du pape Paul VI, un nouveau ton se fait entendre par la voix du patriarche Maximos IV Saigh, s'exprimant au nom de son synode patriarcal grec-melkite, le 10 novembre 1965 en *aula* du Concile Vatican II, en ces termes :

[...] c'est pourquoi, nous voudrions que l'Église, si elle tient à ne pas supprimer les indulgences purement et simplement, par un acte positif de sa part, nous voudrions qu'elle réajuste sa pratique des indulgences : en supprimant toute comptabilité de jours, d'années ou de siècles : ce point, le schéma (la *Positio* du pape Paul VI) l'a déjà réalisé ; en supprimant, dans la notion d'indulgence partielle, tout rapport d'équation mathématique entre mérite du pénitent et apport satisfaisant de l'Église, car l'Église ne multiplie pas par un coefficient déterminé le mérite des fidèles ; en supprimant, même dans l'indulgence plénière, toute idée d'assurance automatique d'acquiescement total [...] ¹⁶.

Et le patriarche d'ajouter, en d'autres termes, que la doctrine et la discipline des indulgences donnent autant de place à la démarche toute personnelle du fidèle pénitent, qu'à celle de la prière qu'organise l'Église à l'intention de ses membres, prière ecclésiale « valorisée et élevée par les mérites du Christ » ¹⁷. À notre avis, l'objection circonstanciée présentée par ce prélat oriental ne peut pas ne pas avoir contribué à occasionner l'évolution de la doctrine du magistère pontifical, non seulement en procédure, mais aussi en doctrine.

6.2 — Déclaration du cardinal Döpfner

Le cardinal Julius Döpfner, en tant que président de la conférence épiscopale allemande, a pris la parole au nom de son épiscopat sur la *Positio*, au lendemain de l'intervention du Patriarche grec-melkite. Les évêques allemands expriment une critique de la théologie des indulgences telle

¹⁶ MAXIMOS IV, *L'Église Grecque-Melkite au Concile : Discours et notes du Patriarche Maximos IV Saigh et des Prélats de son Église au Concile œcuménique Vatican II*, Beyrouth, Dar-Al-Kalima, 1967, 487.

¹⁷ *Ibid.*

qu'elle ressort de la *Positio*, parce que cette théologie ne prend pas en compte le processus d'évolution de la discipline pénitentielle. Car ces évêques reprochent à la *Positio* ceci : « La théologie usuelle des indulgences ne tient pas assez compte d'un fait historique plus clairement perçu aujourd'hui : le passage que l'on fit au XIII^e siècle, de la peine temporelle attachée [au péché] par l'Église, à la remise de la peine attachée au péché par Dieu [par le ministère du sacrement de pénitence administré par l'Église]. Or, l'Église ignore la mesure de cette peine et n'en est par conséquent pas juge »¹⁸.

Les évêques allemands ajoutent qu'existe une équivoque quant à la coopération entre l'Église catholique romaine latine et chaque pécheur dans le processus de la remise de peine : en d'autres termes, l'Église se substituerait trop à la place du pécheur. Il est convenu en catholicisme qu'une remise s'obtient moyennant une démarche de charité ; mais cette pratique a malheureusement glissé dans l'abus de la vénalité. Il faut donc chercher à rééquilibrer le rapport doctrinal et pastoral entre mérite humain et grâce divine.

6.3 — Déclaration du cardinal Alfrink

Quant au troisième orateur, le cardinal Bernardus Johannes Alfrink, président de la conférence épiscopale de Pays-Bas, il a déclaré en substance qu'existe, à lire la *Positio*, une discordance entre la pratique des indulgences et la « saine théologie »¹⁹. Il ajoute que la *Positio* raisonne à tort en soutenant comme si la peine du péché n'était que vindicative, et comme si la remise du péché était une affaire d'ordre juridique et quantitative. Il s'agit donc, selon l'épiscopat hollandais, de réviser la théologie de la *Positio*.

7 — Quelques éléments de la *Positio*

Le pape Paul VI, devant le rejet en 1965 de sa proposition de *Positio* par certaines conférences épiscopales, a nécessairement réfléchi aux enjeux dogmatiques et ecclésiologiques à propos de la doctrine et de la discipline du sacramental des indulgences. Car il s'agissait de tenir compte absolument de ce que l'Église avait déjà dogmatisé en 1343 sous le pontificat de Clément

¹⁸ LAURENTIN, *Bilan du Concile*, 148.

¹⁹ Cf. *ibid.*, 149.

VI, d'une part. Mais d'autre part, de rechercher aussi quels approfondissements et quelles adaptations de ce dossier des indulgences étaient possibles et compatibles avec la dogmatique. Il s'agissait aussi de ne pas verser dans le moindre réductionnisme moderniste. Il fallait enfin tenir compte des meilleures critiques et interpellations, notamment celles des milieux œcuméniques les plus avertis et celles issues de la très respectable tradition orientale catholique à propos des suffrages que peuvent adresser l'Église et ses fidèles à Dieu, le tout miséricordieux. Les historiens relateront ces différents apports théologiques et les discernements pontificaux de Paul VI, après l'ouverture des archives concernant son pontificat (1963-1978).

Selon les textes catholiques romains autorisés sur les indulgences et les commentaires théologiques correspondants, il ressort ceci : existait, lors de la préparation de la *Positio* destinée à tout l'épiscopat catholique romain latin et oriental, la conviction d'une nécessité en histoire, en théologie et en droit canonique, de mieux comprendre ce dossier des indulgences. Spécialement, la christianisation patristique et médiévale des peines temporelles, ainsi que toute la démarche à la fois doctrinale, disciplinaire, pastorale et morale de l'administration du sacramental des indulgences.

Selon le théologien Peter Hünemann déjà évoqué dans le présent article, le document de la *Positio* est divisé en deux parties. La première traite des principes théologiques augmentés d'une lecture institutionnelle de la discipline des indulgences. La seconde partie concerne les décisions administratives et pastorales²⁰.

Quelques-unes de nos remarques à propos du retrait de la *Positio* au Concile Vatican II et à propos de la détermination avérée chez le pape Paul VI de réformer la discipline de indulgences, mais avec prudence.

Quant à la *Positio*, proposée en vain, et pour avis seulement aux évêques, mais aussi indirectement au Concile Vatican II, juste avant la fin de ce Concile, par le pape Paul VI en 1965, ce document avait donc sans doute pour objet que le pape puisse tenter avec prudence un ajustement pastoral des indulgences. Mais le contenu de ce texte de la *Positio* n'a pas su s'ouvrir suffisamment au débat alimenté depuis des siècles par le malaise occasionné par l'administration des indulgences.

Devant les trois prises successives de position critique en plein Concile Vatican II à propos de la *Positio*, le pape Paul VI a préféré faire cesser le débat, nous l'avons dit, pour éviter que le Concile se transforme en un colloque incertain.

²⁰ Cf. HÜNNEMANN, « La discussion autour des indulgences ».

Conclusion

Le pape Paul VI n'a pas abandonné le projet de réformer les indulgences selon son propre exercice de la prudence, au risque d'être encore critiqué comme n'allant pas assez loin dans la réforme. Il faudrait évoquer la suite de ses efforts de réforme entre les années 1965 et 1978, pendant lesquelles des éléments de la *Positio* sont perceptibles ou bien ont déjà muri. En tout cas, il est possible d'affirmer que cette tentative de réforme des indulgences dans le catholicisme latin n'a pas seulement été perceptible dans les années 1965-1978.²¹

Entre les lendemains de la non réception de la *Positio* de 1965 et l'indiction de la Bulle *Le visage de la miséricorde* de 2015 du pape François,²² il ressort le défi ecclésial suivant : savoir conjoindre d'un côté, l'attachement convictionnel de l'Église catholique romaine en faveur du bien-fondé doctrinal des indulgences, et d'un autre côté, sa nouvelle prise de conscience de la nécessité d'une profonde réforme. Prise de conscience qui recherche une réforme qui soit à distance de tout modernisme : réforme aux moyens d'ajustements du sacramental des indulgences qui soient non seulement procéduraux, mais aussi doctrinaux²³. Plus précisément, avec la suite du pontificat de Paul VI et durant tout le pontificat de Jean-Paul II, il s'agissait déjà de la continuation, en raison des difficultés rencontrées par la *Positio* du pape Paul VI en 1965, de la mise à jour canonique des indulgences, mais avec un souci doctrinal renouvelé quant à ce sacramental.

²¹ Notre thèse de 2016 a dû mener son enquête jusqu'à une nouvelle étape de réforme des indulgences décidée par le pape François sous la forme de son indiction de 2015. MENSAH, *Les indulgences*

²² FRANÇOIS (pape), Bulle *Misericordiae vultus*, 11 April 2015, dans AAS, 107 (2015), 399-420 ; *Le visage de la miséricorde*, Paris, Cerf, 2015, 60 pages.

²³ Réforme lancée dès 1967 par le pape Paul VI après l'interruption en 1965 de l'examen de la *Positio* à Vatican II. Cette réforme de 1967 est celle de la Constitution apostolique *Regimini Ecclesiae universae*, suivie en 1968 par une réforme, toujours du pape Paul VI, selon l'*Enchiridion indulgentiarum. Normae et concessionnes*, puis en 1974 par une autre réforme comportant la Lettre *Apostolorum limina*. Ces initiatives novatrices du pape Paul VI seront développées par le pape Jean-Paul II : en 1980, dans sa Lettre encyclique *Dives misericordia* (La Miséricorde divine) et en 1983, d'une part dans sa Bulle *Aperite portas Redemptori*, et d'autre part dans le Code de droit canonique latin, puis en 1990, dans le Code des canons des Églises orientales, suivi en 1995 de la Constitution apostolique *Tertio millenio adveniente*, suivie en 1998 de sa Bulle *Incarnationis mysterium*, du Catéchisme de l'Église catholique (avec ses rééditions), et enfin en 1999 de l'*Enchiridion indulgentiarum: normas et concessionnes*. Quant au pontificat de Benoît XVI, son apport à cet égard, spécialement dans son Encyclique *Deus caritas* de 2005, a porté surtout sur des actes et des valeurs qui sont censés aider les fidèles chrétiens à accueillir la grâce de la miséricorde divine.

En tout cas, à lire les textes magistériels et disciplinaires catholiques romains des XX^e et XXI^e siècles, le degré de conscience de la catholicité, quant à la subsistance de certains malaises à l'encontre des indulgences, a évolué vers une prise en considération peu à peu grandissante de ces malaises. C'est ainsi qu'aurait surgi, en monde catholique romain, une certaine conviction en faveur de la nécessité de préciser la dogmatique, d'ajuster la discipline et de prendre en compte – davantage – l'autre approche catholique de la miséricorde divine : à savoir celle existant en traditions orientales au moyen uniquement des suffrages, et non pas seulement au moyen des indulgences²⁴.

Nous pourrions résumer les termes de ce renouvellement de la manière suivante : mettre fin à une problématique de quasi-transaction entre la justice de Dieu et le pécheur disposé pour obtenir l'indulgence divine²⁵. C'est pourquoi, à notre avis, avec l'initiative réformatrice du pape François, la miséricorde est le nouveau nom de l'indulgence.

²⁴ Mais les codifications latine de 1983 et orientale de 1990, sous le pontificat de Jean-Paul II, sont tout de même attachées à faire en sorte que, si des fidèles orientaux catholiques souhaitent bénéficier eux aussi du sacramental latin des indulgences, le droit canonique ainsi codifié le leur permette.

²⁵ Le présent article correspond à l'état de nos recherches à la date de février 2020, date à laquelle beaucoup d'archives ne sont pas encore accessibles. C'est pourquoi, nous ne sommes pas en mesure de préciser, avec les historiens, comment le Magistère catholique est passé du registre de la quasi-transaction matérielle à celui de la non transaction matérielle dans sa doctrine des indulgences. Nous entendons désormais poursuivre nos recherches grâce à l'ouverture en cours de nouvelles archives, notamment au Vatican. À la date actuelle, nous persistons à déclarer ceci : une des tâches urgentes pour la recherche consiste en une évaluation encore plus profonde (théologique, canonique, historiographique) du degré d'influence de la si percutante déclaration du patriarche Maximos IV Saigh au Concile Vatican II à propos de la *Positio*, le 10 novembre 1965.

L'ENQUÊTE PRÉLIMINAIRE DANS LA PROCÉDURE PÉNALE CANONIQUE

VALÈRE NKOUAYA MBANDJI, S.J.

RÉSUMÉ — Cet article présente et analyse le déroulement l'enquête préliminaire dans la procédure pénale canonique. De manière méthodique, est mis en relief la *notitia criminis* ainsi que sa nécessaire évaluation afin de ne pas léser illégitimement le droit à la bonne réputation du suspect. Outre l'explicitation du rôle de l'enquêteur et l'objet de l'enquête préliminaire, l'auteur pose la question des droits de la défense pendant l'enquête préliminaire. Il y mentionne les lacunes du Code actuel en la matière et questionne une certaine pratique courante du secret durant cette procédure. Il plaide pour une certaine transparence des tribunaux ecclésiastiques pendant l'enquête préliminaire afin que les droits de la défense soient mieux assurés et protégés.

SUMMARY — This article presents and analyzes the course of the preliminary investigation in canonical penal procedure. In a methodical way, the *notitia criminis* is highlighted as well as its necessary evaluation in order not to harm illegitimately the right to the good reputation of the suspect. In addition to explaining the role of the investigator and the subject of the preliminary investigation, the author raises the question of the rights of the defense during the preliminary investigation. He mentions the shortcomings of the current Code in this area and questions a certain common practice of secrecy during this procedure. He pleads for a certain transparency of the ecclesiastical courts during the preliminary investigation so that the rights of the defense are better assured and protected.

Introduction

On peut affirmer sans risque de se tromper que les juridictions ecclésiastiques ont été par le passé très peu saisies en matière pénale. Était-ce la résultante d'une réaction répulsive ou d'un malaise avéré à l'idée de punition souvent implicite à l'évocation d'un procès pénal ?¹ Ou alors, la raison

¹ Voir A. BORRAS, « L'Église peut-elle encore punir ? », dans *Nouvelle revue théologique*, 113 (1991), 204-211. Pour la corrélation entre responsabilité et peine, voir G. LO CASTRO,

doit-elle être trouvée dans une certaine compréhension antagonique de la notion de justice et celle de la miséricorde ? Toujours est-il que « la révélation dans le dernier tiers du XX^e siècle, de graves atteintes sexuelles de prêtres ou de religieux sur des mineurs a provoqué un trouble considérable dans l'Église et dans l'opinion publique »². Le constat de ces délits a poussé l'Église à redécouvrir un des outils précieux et spécifiques pour répondre à des situations difficiles : la procédure pénale canonique. Cette dernière présente quelques particularités dont l'enquête préliminaire qui peut être définie comme la phase préliminaire du procès criminel. De caractère administratif, elle a pour but de déterminer si la nouvelle du délit reçue (*notitia criminis*) est suffisamment crédible au point de justifier l'ouverture d'un procès pénal soit judiciaire (c. 1721) soit extra-judiciaire c. 1720)³. Dans les cc. 1717 à 1719, le législateur canonique de 1983 traite de l'enquête préliminaire. Comment se déroule l'*inquisitio praevia* ? La personne sous enquête préliminaire jouit-elle de droits quelconques au cours de cette étape dite d'avant-procès ? Telles sont les deux questions essentielles qui forment les deux axes majeurs de cet article.

1 — La réception et l'évaluation de la *notitia criminis* (c. 1717)⁴

À la survenance d'une dénonciation ou d'une allégation au moins vraisemblable (*saltem verisimilem*), l'Ordinaire⁵, accomplissant son devoir de

« Responsabilité et punition : Prémisses anthropologiques d'un débat sur les sanctions pénales dans le droit de l'Église », dans M.P. DUGAN (dir.), *La procédure pénale et la protection des droits dans la législation canonique*. Actes d'un colloque à l'Université pontificale de la Sainte-Croix, Rome, les 25 et 26 mars 2004, Montréal, Wilson & Lafleur, 2008, 13-40 (= DUGAN [dir.], *La procédure pénale et la protection des droits*). Pour la rareté des sentences judiciaires pénales dans les sentences de la Rote Romaine de 1983 à 1990, voir C. GULIO, « Les raisons de la protection judiciaire dans le domaine pénal », dans DUGAN (dir.), *La procédure pénale et la protection des droits*, 153-154 (= GULIO, « Les raisons de la protection judiciaire »).

² E. ALGIER-GIRAULT, « Le procès pénal canonique, un enjeu ecclésial de vérité et de guérison », dans *Revue des sciences religieuses*, 90 (2016), 403 (= ALGIER-GIRAULT, « Le procès pénal canonique »).

³ Voir J.A. RENKEN, *The Penal Law of the Roman Catholic Church: Commentary on Canons 1311-1399 and 1717-1731 and Other Sources of Penal Law*, Ottawa, Faculty of Canon Law, Saint Paul University, 2015, 390 (= RENKEN, *The Penal Law of the Roman Catholic Church*).

⁴ Voir CIC/83, c. 1717, § 1 : « Chaque fois que l'Ordinaire a connaissance, au moins vraisemblable, d'un délit, il fera par lui-même ou par une personne idoine, une enquête prudente portant sur les faits, les circonstances et l'imputabilité du délit, à moins que cette enquête ne paraisse totalement superflue ».

⁵ Par Ordinaire, il faut entendre selon le c. 134, § 1, outre le Pontife Romain, les Évêques diocésains et ceux qui, même à titre temporaire seulement, ont la charge d'une Église particulière ou d'une communauté dont le statut est équivalé au sien selon le c. 368 (la prélature territoriale,

vigilance (c. 392) a la responsabilité d'évaluer attentivement si les faits délictuels allégués sont vraisemblables⁶. Il doit en outre s'interroger sur sa compétence à juger un tel délit. Une question préalable à cette dernière est celle de la définition de la *notitia criminis*.

1.1 — La *notitia criminis*

La *notitia criminis* renvoie aux informations reçues par l'autorité compétente relativement à un fait ou à des actes qui constituent un délit canonique. Il s'agit des allégations qui ne fournissent aucune certitude par rapport à la commission des faits pénalement illicites⁷. Il s'agit en réalité de nouvelles qui ont l'apparence de la vérité (*veri similis*). Ces allégations aux termes du c. 1717, § 1 *CIC/83* doivent paraître au moins « vraisemblables » et fournir des éléments (le nom, la date, le lieu où le délit aurait été commis) qui permettent de vérifier la vraisemblance des faits.

Malgré le silence du Code actuel sur la manière dont la *notitia criminis* peut être acquise, on peut, prenant en compte le c. 1939 *CIC/17* affirmer que la nouvelle du délit présumé commis peut advenir soit par le mécanisme de la réception, soit par celui de l'appréhension directe de l'autorité compétente (par exemple lors d'une visite canonique du diocèse (c. 396, § 1)⁸. Toute personne, baptisée ou non, peut porter des allégations à l'endroit d'un membre de l'Église si elle estime qu'un délit a été commis⁹. La *notitia criminis* peut donc découler

l'abbaye territoriale, le vicariat apostolique, la préfecture apostolique, l'administration apostolique érigée de manière stable), les Vicaires généraux et épiscopaux ; les Supérieurs majeurs des instituts religieux cléricaux de droit pontifical et des sociétés cléricales de vie apostolique de droit pontifical ; le prélat de la prélature personnelle et les Ordinaires militaires (c. 295).

⁶ Pour les cas spécifiques de délits sexuels sur des personnes mineures, selon le document de référence actuel en la matière de la conférence épiscopale canadienne, toute allégation d'abus sexuels portée contre un membre du clergé, qu'elle soit douteuse ou bien fondée, doit être signalée au délégué ou au délégué adjoint qui sera désigné par l'Ordinaire pour traiter les questions relatives aux abus sexuels ou aux allégations d'inconduite sexuelle. Voir CONFÉRENCE DES EVÊQUES CATHOLIQUES DU CANADA, *Protection des personnes mineures contre les abus sexuels : Appel aux fidèles catholiques du Canada pour la guérison, la réconciliation et la transformation*, Ottawa, CECC, 2018, 104, §4.3 (= CONFÉRENCE DES EVÊQUES CATHOLIQUES DU CANADA, *Protection des personnes mineures*).

⁷ Voir C. PAPALE, *Il processo penale canonico : commento al Codice di diritto canonico, libro VII, parte IV*, 2 éd., Cité du Vatican, Urbaniana University Press, 48 (= PAPALE, *Il processo penale canonico*).

⁸ Le *CIC/83* contrairement au *CIC/17* ne précise pas la source de provenance de la *Notitia criminis*. Voir PAPALE, *Il processo penale canonico*, 49, notes 31 et 32.

⁹ Voir J.J. FOLEY, « Preliminary Investigation: Consideration and Options », dans DUGAN (dir.), *Towards Future Developments in Penal Law*, 36 (= FOLEY, « Preliminary Investigation »).

d'une dénonciation, d'une plainte, d'une rumeur généralisée, d'une demande de dédommagement ou d'un rapport de police¹⁰. De nos jours la « nouvelle du crime » peut parvenir à l'autorité ecclésiastique par le canal des nouvelles technologies de communication (internet, facebook...)¹¹.

La *notitia criminis* peut être écrite, orale ou visuelle (par exemple des photos compromettantes d'un prêtre envoyées sur le téléphone de l'évêque). La date de la réception de la *notitia criminis* doit être notée. Celle orale doit être retranscrite datée et signée. De même, les photos doivent être imprimées et datées par l'Ordinaire ou son délégué¹². Bien que le c. 1717 ne fasse pas de différence entre les dénonciations signées et celles anonymes, on peut déduire au vu du c. 1942, § 2 *CIC/17* et d'une partie de la doctrine canonique qu'on n'est pas obligé d'ouvrir une enquête préliminaire en cas de dénonciation anonyme¹³. Une des raisons est que de telles dénonciations anonymes manquent de crédibilité et ne constituent pas une base suffisante pour commencer une enquête¹⁴. Toutefois, la survenance d'une lettre anonyme peut être un élément qui incite l'Ordinaire à décider l'ouverture d'une enquête préliminaire¹⁵. De toute façon l'allégation d'un délit présumé doit faire l'objet d'une évaluation afin de décider de l'opportunité d'ouvrir une enquête préliminaire. Injustifiée, cette dernière pourrait causer du tort à la personne suspectée, la fragiliser ou même enfreindre à sa réputation.

¹⁰ Voir FOLEY, « Preliminary Investigation », 40. Cet auteur recommande que l'Ordinaire n'accepte pas le rapport de police dans certains cas comme le dernier mot, mais qu'il décrète l'ouverture d'une enquête préliminaire canonique.

¹¹ Voir D.G. ASTIGUETA, « L'investigazione previa: alcune problematiche », dans *Periodica*, 98 (2009), 202 (= ASTIGUETA, « L'investigazione previa »).

¹² Voir L. MILLETTE, « An Analysis of the Preliminary Investigation in the Light of the Rights of the Accused », dans *Jur*, 75 (2015), 137 (= MILLETTE, « An Analysis of the Preliminary Investigation »).

¹³ Voir A. CALABRESE, *Diritto penale canonico*, Cité du Vatican, LEV, 2016, 146 (= CALABRESE, *Diritto penale canonico*); ASTIGUETA, « L'investigazione previa », 201. Une partie de la doctrine canonique soutient que tout dépend du contenu de la lettre anonyme. Si cette dernière contient des éléments qui peuvent permettre la corroboration des faits (c. 1942, § 2 *CIC/17*), alors elle doit être prise en compte et servir de base à une enquête préliminaire. Aussi parce qu'il faut suvegarder le bien commun, les évêques des États-Unis d'Amérique essaient de manière générale et autant que possible de répondre à toutes les dénonciations, même celles anonymes. Voir MILLETTE, « An Analysis of the Preliminary Investigation », 136. Le c. 1942, § 2 *CIC/17* considèrerait les lettres anonymes comme nulles : « Doivent être tenues pour nulles les dénonciations faites par un ennemi manifeste du dénoncé, par un homme vil et indigne, ou par des lettres anonymes manquant des compléments et autres éléments susceptibles de rendre l'accusation à peu près probable ».

¹⁴ Voir W.H. WOESTMAN, *Ecclesiastical Sanctions and the Penal Process. A Commentary on the Code of Canon Law*, Ottawa, Saint Paul University, 2003, 161.

¹⁵ Voir RENKEN, *The Penal Law of the Roman Catholic Church*, 391.

1.2 — L'évaluation de la *notitia criminis*

Il est vrai que l'arrivée parfois imprévisible d'une *notitia criminis ipso facto* installe un climat de doute à l'égard de la personne désormais suspectée¹⁶. Cette dernière se trouve ainsi dans une situation de grande vulnérabilité surtout lorsque la *notitia criminis* porte sur des abus sexuels sur une personne mineure¹⁷. Mais il est capital de ne pas perdre de vue que la *notitia criminis* est un énoncé hypothétique¹⁸. La personne suspectée est présumée innocente jusqu'à preuve du contraire.

Un premier effort d'évaluation consiste à distinguer des allégations objectivement infondées de celles notoires qui rendent toute enquête superflue¹⁹. Il va sans dire que les informations qui sont invraisemblables ou absurdes ou qui manquent d'un minimum de fondement doivent être sujettes à un « filtre » ou à une évaluation par l'Ordinaire. Ce dernier ne peut donc retenir des pures conjectures ou des suppositions comme étant la *notitia criminis*. Il doit archiver et « classer sans suite » (du moins jusqu'à ce que parvienne une dénonciation crédible), les nouvelles qui ne présentent aucun fondement, celles qui, objectivement et subjectivement ne présentent aucune vraisemblance. Nonobstant le caractère invraisemblable des faits, malgré l'absence des éléments susceptibles de permettre l'ouverture d'une enquête préliminaire, l'Ordinaire, s'il le juge nécessaire peut procéder à une correction fraternelle par les moyens pastoraux mentionnés au c. 1341 ; ou alors il peut faire une monition selon le c. 1339. Ainsi, si d'aventure une nouvelle du même genre surgissait à nouveau, il pourrait recourir immédiatement à un procès pénal²⁰.

¹⁶ À l'annonce des allégations de délit, la personne est à cette étape, qualifiée de « suspecte ». À l'ouverture de l'enquête préliminaire, elle sera appelée « la personne sous investigation préliminaire ». Lorsqu'une accusation canonique formelle a été portée contre la personne celle-ci sera appelée « l'accusé ». Voir COMMISSION PONTIFICALE POUR LA RÉVISION DU CODE DE DROIT CANONIQUE, « Art. 2. De Processus Evolutione », dans *Comm*, 12 (1980), 1954. Ce n'est qu'après avoir été formellement condamnée par une sentence qu'elle est appelée « coupable » ou « criminelle ». Voir MILLETTE, « An Analysis of the Preliminary Investigation », 141.

¹⁷ Voir D. SMILANIC, « Clergy Personnel Files and the Instruction of an Allegation », dans *CLSAP*, 59 (2007), 195 (= SMILANIC, « Clergy Personnel Files »).

¹⁸ Voir L. CARLI, *Le indagini preliminari nel sistema processuale*, Giuffrè, Milan, 2005, 175.

¹⁹ Voir T.J. GREEN, « The Preliminary Investigation », commentaires des cc. 1717-1719, dans *CLSA Comm2*, 1808 (= GREEN, « The Preliminary Investigation »). Voir aussi ASTIGUETA, « L'investigazione previa », 203.

²⁰ F.G. MORRISEY, « Penal Law in the Church Today: Recent Jurisprudence and Instructions », dans P. DUGAN (dir.), *Advocacy Vademecum*, Montreal, Wilson & Lafleur, 2006, 53 (= MORRISEY, « Penal Law in the Church Today »).

En outre, il faut aussi être attentif à déterminer l'intention réelle de l'auteur de l'allégation. Pourquoi porte-t-il l'allégation, pourquoi dénonce-t-il ? Est-ce pour le bien de la communauté ecclésiale ou est-ce par désir de vengeance ? Y a-t-il un conflit d'intérêts entre l'auteur de l'allégation et la personne suspectée ? (Il faut reconnaître que cette intention peut être difficile à desceller au début et ne surgir que lors du procès). Sans toutefois perdre de vue l'allégation faite, il est aussi important de chercher à connaître ne serait-ce que sommairement qui est la personne qui fait l'allégation, quel est son travail, son histoire.

Lorsqu'il s'agit d'un délit notoire ou indéniable, l'enquête est inutile. De même, l'ouverture d'une enquête préliminaire dans certains cas peut être superflue (en cas d'aveu de la personne par exemple). Tel le cas d'un clerc déjà condamné par la justice civile. Dans ce cas, les faits sont publiquement connus et l'enquête préliminaire n'est plus toujours nécessaire. L'Ordinaire peut donc immédiatement initier un procès pénal comme si l'enquête préliminaire avait été faite et conclue. Toutefois, dans d'autres cas, bien que le clerc ait déjà été condamné par la justice civile, l'enquête préliminaire peut être nécessaire en vue de déterminer les faits, les circonstances et surtout l'imputabilité (c. 1321) sans laquelle la personne ne peut recevoir une peine.

Aussi, il revient à l'Ordinaire de discerner le caractère vraisemblable de l'allégation, sa crédibilité et de décider si elle mérite d'amples investigations. Pour prendre cette décision, il peut certes se faire aider²¹, mais il n'a pas besoin de parvenir à une certitude morale comme requis lors du procès pénal lui-même. Il a tout de même une responsabilité morale et juridique d'aller

²¹ Aux États-Unis d'Amérique, par exemple, pour les diocèses qui ont accepté la loi particulière comprise dans la *Charter for the Protection of Children and Young People* à laquelle sont associées les *Essential Norms for Diocesan/Eparchial Policies Dealing with Allegations of Sexual Abuse of Minors by Priest or Deacons*, l'Ordinaire est assisté dans la détermination du caractère vraisemblable de l'allégation par un comité consultatif et confidentiel (« Review Board ») tel que requis par l'art. 2 de la Charte susmentionnée. Bien que ce comité soit prévu pour n'être consulté que dans des cas spécifiques d'abus sexuels sur des personnes mineures par des prêtres et des diacres, il est dans la pratique utilisé pour assister l'Ordinaire dans les autres délits sexuels. Formé de cinq membres à majorité de laïcs, le comité assiste l'Ordinaire dans la détermination du caractère vraisemblable de l'allégation d'abus sur mineur ainsi que sur l'idoneité du clerc accusé à retourner au ministère. Aussi, les membres de ce comité donnent leur opinion quant au caractère vraisemblable de la *notitia criminis*. L'Ordinaire peut ainsi décider après leur consultation d'ouvrir l'enquête préliminaire ou non. Au cas où l'enquête préliminaire est faite, le comité regarde aussi les actes d'enquête pour voir s'il y a suffisamment de preuves pouvant donner lieu à la clôture de l'enquête préliminaire et l'ouverture d'un procès pénal. Avec cette aide, l'Ordinaire pourra alors décider de procéder ou non à un procès pénal. L'existence de ce comité n'empêche pas l'Ordinaire de consulter d'autres juges ou experts en droit s'il le juge nécessaire. Voir MILLETTE, « An Analysis of the Preliminary Investigation », 140, 153-155.

de l'avant si les facteurs objectifs montrent qu'une enquête est nécessaire²². Dans ces circonstances, ne pas permettre l'ouverture d'une enquête préliminaire, pourrait causer du dommage à la communauté et laisser croire que nous sommes en présence d'un système arbitraire ou qu'il manque une uniformité dans l'application des lois canoniques (c. 1316). Face à l'allégation d'un délit, l'Ordinaire doit aussi se poser la question de sa compétence.

1.3 — La détermination de la compétence de l'Ordinaire face à la *notitia criminis*

Un élément que doit vérifier l'Ordinaire avant de décréter l'ouverture de l'enquête préliminaire est sa compétence. Est-il compétent pour poursuivre le délit qui aurait été commis ? Il sera compétent si le suspect a son domicile ou son quasi domicile dans les limites de sa juridiction (c. 1408). Si le domicile ou le quasi-domicile, ni le lieu de résidence de la personne ne sont connus, alors l'Ordinaire de la place du for du demandeur est compétent à condition qu'il n'y ait pas d'autre for légitime (c. 1409, § 2). L'Ordinaire sera aussi compétent si le délit a été commis sur son « territoire »²³. *A contrario*, l'ordinaire sera incompétent si la personne n'est pas sujette aux lois de l'Église (c. 11). De plus, les causes impliquant les cardinaux, les évêques et chefs d'États sont réservées au Pontife Romain (c. 1405). Lorsque l'Ordinaire se rend compte qu'il est incompétent, il peut faire parvenir la *notitia criminis* à celui qui est compétent ou au lieu de compétence prévu par le législateur. S'il s'estime compétent, alors il peut décider d'émettre un décret d'ouverture de l'enquête préliminaire.

2 — Le décret d'ouverture de l'enquête préliminaire (c. 1719)

L'ouverture de l'enquête préliminaire est matérialisée par la nomination d'un enquêteur et d'un notaire²⁴. En effet la *notitia criminis* ne suffit pas en

²² Voir ASTIGUETA, « L'investigazione previa », 205.

²³ Voir CIC/83, c. 1412 : « Dans les causes pénales, l'accusé, même absent, peut être assigné devant le tribunal du lieu où le délit a été commis ».

²⁴ La figure du promoteur de justice n'est pas en soi nécessaire lors de l'enquête préliminaire. Mais si l'Ordinaire le juge nécessaire, il peut y prendre part puisqu'il est *ex officio* le défenseur du bien public des fidèles qui dans des cas de *delicta graviora* est toujours lésé. Quand un promoteur de justice est nommé, l'enquêteur pourrait faire usage du questionnaire préparé par lui. Voir L. ORTAGLIO, « L'indagine previa nei casi di delicta graviora », dans ASSOCIAZIONE CANONISTICA ITALIANA (dir.), *Questioni attuali di diritto penale canonico*, Studi giuridici 96, Cité du Vatican, LEV, 2012, 100-101.

soi. Il faut en plus la décision de l'Ordinaire qui par un acte juridique formel, décrète l'ouverture de l'enquête et désigne l'enquêteur²⁵.

2.1 — La figure de l'enquêteur et sa fonction (c. 1717, § 3)

L'Ordinaire est le premier responsable de l'enquête préliminaire. Puisqu'il ne convient pas qu'il la conduise personnellement, il doit, aux termes du c. 1717, § 1, nommer une personne physique idoine et prudente pour le faire²⁶. L'expérience montre aussi qu'il ne sied pas que le vicaire judiciaire soit l'enquêteur car sa priorité pourrait être celle de protéger le diocèse parfois au détriment du sujet de l'enquête. D'où un conflit d'intérêt potentiel²⁷. Si d'aventure le vicaire judiciaire est désigné pour mener l'enquête préliminaire, il ne peut, par souci d'éviter des préjugés et toute impartialité, être lui-même juge dans le procès pénal qui suit l'enquête dans son tribunal. L'enquêteur doit agir avec diligence, délicatesse et confidentialité. C'est dire que « la recommandation qui est faite à l'enquêteur est de mener l'enquête dans le plus grand secret afin de ne pas rendre le délit public et faire du tort à la réputation de l'accusé »²⁸. Le décret de nomination de l'enquêteur (autrefois appelé l'inquisiteur) doit préciser le mandat de l'enquêteur : il doit enquêter sur la réalité du fait, les circonstances et l'imputabilité juridique des délits allégués lors de la dénonciation. Ces trois éléments mentionnés par le c. 1717, § 1 qui constituent le triple objet de l'enquête préliminaire déterminent le délit²⁹. En effet, l'enquête peut laisser apparaître des circonstances atténuantes ou aggravantes (cc. 1321-1330) au cas où le délit aurait été effectivement réalisé.

L'enquêteur doit aussi – on a parfois tendance à l'oublier – vérifier la crédibilité de toute information favorable à la personne sous enquête. Un rapport monolithique de l'enquêteur qui se focalise seulement sur des éléments pouvant être accablants pour la personne sous enquête et ignore les éléments pouvant lui être favorables manquerait d'objectivité et entacherait

²⁵ Voir J. SANCHIS, « L'indagine previa al processo penale », dans *IE*, 4 (1992), 532.

²⁶ Voir J. VERNAY, « Les procès dans le Code de droit canonique », dans *AC*, 30 (1987), 343 (= VERNAY, « Les procès dans le Code »).

²⁷ Voir F.G. MORRISEY, « The Preliminary Investigation in Penal Cases: Some of the Better Practices », dans *The Canonist*, 2 (2011), 191 (= MORRISEY, « The Preliminary Investigation »).

²⁸ A.G. URRU, « Observations sur l'imposition des peines dans des cas particuliers », dans DUGAN (dir.), *La procédure pénale et la protection des droits*, 372 (= URRU, « Observations sur l'imposition des peines »).

²⁹ Les cc. 1321 à 1330 du *CIC/83* permettent de mieux comprendre le triple objet de l'enquête préliminaire.

la qualité même de l'enquête préliminaire³⁰. Si l'enquêteur n'a pas besoin d'être licencié ou expert en droit canonique, il doit tout de même connaître les aspects nécessaires du droit pénal impliqués dans l'enquête préliminaire qu'il doit mener³¹ ou du moins il doit avoir un certain type de compétence dans le domaine sur lequel il enquête. C'est dire qu'il doit au moins avoir une bonne compréhension des cc. 1321-1330 qui lui permettront de savoir rechercher des faits qui constituent une violation externe de la loi ou du précepte ; être capable de distinguer les conditions de l'imputabilité de celles de la « punissabilité »³². Il doit non seulement se poser la question de savoir si l'acte allégué a effectivement été réalisé, mais encore si ledit acte peut-être attribué à l'auteur dénoncé. Par ailleurs, il doit se demander si l'acte allégué est interdit par la loi ou le précepte ? Si l'acte est frappé de prescription, si la personne sous enquête (un évêque, un cardinal, un chef d'États...) a une juridiction réservée, si l'acte aurait été commis sur une personne mineure ?

Les pouvoirs de l'enquêteur sont déterminés par le § 3 du c. 1717 : « Celui qui mène cette enquête a les mêmes pouvoirs et les mêmes obligations qu'un auditeur dans un procès ; et, si le procès judiciaire est ensuite engagé, il ne peut y tenir la place de juge ». L'enquêteur est donc, dans ses facultés et ses obligations, équiparé à l'auditeur dont la fonction est de recueillir les preuves, déterminer celles qui doivent être collectées et les transmettre à l'Ordinaire (c. 1428, § 3). L'enquêteur est rendu inhabile à être juge dans l'éventualité d'un procès. Urru fait remarquer malgré le silence de la loi que, contrairement à ce qui s'est fait de temps en temps, l'enquêteur ne peut être cité devant un tribunal pour témoigner sous serment sur ce qui a été noté dans l'*inquisitio*. De même après avoir mené l'enquête et transmis les résultats à l'Ordinaire, il ne peut « déposer des accusations formelles » contre l'accusé devant le même Ordinaire³³.

Bien que le Code ne s'oppose pas à ce que le promoteur de justice soit l'enquêteur (car il recherche la préservation du bien public), il est généralement

³⁰ Voir FOLEY, « Preliminary Investigation », 47; URRU, « Observations sur l'imposition des peines », 371.

³¹ Voir CALABRESE, *Diritto penale canonico*, 149.

³² V. DE PAOLIS fait une distinction entre l'imputabilité et la punissabilité. Cette dernière signifie l'application plus ou moins concrète de la peine. En cas de manque d'imputabilité, il n'y a absolument pas de délit; par contre, s'il manque de punissabilité, le délit persiste malgré le fait que le sujet (l'auteur), grâce à des causes qui le dispensent, ne puisse être puni. Voir V. DE PAOLIS et D. CITO, *Le sanzioni nella Chiesa: Commento al Codice di diritto canonico Libro VI*, Rome, Urbaniana University Press, 2008, 158-159 (= DE PAOLIS et CITO, *Le sanzioni nella Chiesa*). Par exemple, dans les circonstances visées au c. 1323, le mineur de seize ans ou celui qui a agi forcé par une crainte grave, est imputable mais pas punissable.

³³ Voir URRU, « Observations sur l'imposition des peines », 374.

recommandé de ne pas demander au promoteur de justice d'être enquêteur car nous ne sommes qu'à la phase de l'enquête préliminaire. Sa présence donne l'impression qu'un procès pénal a déjà commencé et qu'un délit a été commis. Même s'il peut être consulté, il sied d'éviter qu'il soit enquêteur pour éviter le risque d'une certaine confusion entre son activité d'enquêteur et celle de la vérification de la véracité des indices. Il pourrait inconsciemment commencer à mener, dans l'enquête préliminaire, une activité accusatrice qu'il devra mener dans la phase du procès même³⁴. Il pourrait aussi y avoir plus tard un conflit d'intérêt si l'enquête préliminaire ne menait pas au procès pénal³⁵. De surcroît, le rôle du promoteur de justice est de protéger les droits de toutes les parties tout au long du procès. Or dans la phase de l'enquête préliminaire, il y aurait peu de droits formels à protéger³⁶. Par conséquent, il est inopportun et inconvenient que le promoteur de justice intervienne comme enquêteur à la phase de l'enquête préliminaire³⁷.

La doctrine diverge sur la question de savoir si l'enquêteur doit être un prêtre ou non. Le Code n'affirme pas que l'enquêteur doive être un prêtre. On peut à partir de là souligner que l'enquêteur peut être toute personne physique (clerc, laïc, homme ou femme) idoine et en communion avec l'Église et pouvant être nommé à un office ecclésiastique (c. 149, § 1)³⁸. Toutefois, l'enquêteur doit-il être un prêtre dans des cas où un prêtre aurait commis un délit ? On sait que pour ce qui est des délits les plus graves, l'art. 14 de la *SST* requiert, *ad validitatem* que le juge, le promoteur de justice le notaire et l'avocat soient des prêtres³⁹. Prenant en compte le fait que cette exigence de la prêtrise peut être dispensée par le Saint-Siège, certains auteurs affirment qu'il est meilleur de faire appel à un prêtre comme enquê-

³⁴ Voir P.R. LAGGES, « The Penal Process: The Preliminary Investigation in the Light of the Essential Norms of the United States », dans *StC*, 38 (2004), 287 (= LAGGES, « The Penal Process »).

³⁵ Voir ASTIGUETA, « L'investigazione previa », 208-210.

³⁶ Voir V. VONDENBERGER, « Balancing Rights: Role of the Promoter of Justice », dans M.P. DUGAN (dir.), *Towards Future Developments in Penal Law: U.S. Theory and Practice*, Montreal, Wilson & Lafleur, 2010, 61 (= DUGAN (dir.), *Towards Future Developments in Penal Law*).

³⁷ Voir COMMISSION PONTIFICALE POUR LA RÉVISION DU CODE DE DROIT CANONIQUE, « De iudicio criminali. Art. 1. De praevia investigatione », dans *Comm*, 12 (1980), 189.

³⁸ Voir MILLETTE, « An Analysis of the Preliminary Investigation », 149-150.

³⁹ Voir JEAN-PAUL II, Lettre apostolique *motu proprio*, *Sacramentorum sanctitatis tutela*, 30 avril 2001, dans *AAS*, 93 (2001), 737-739, traduction française dans *DC*, 99 (2002), 363-365 ; CONGREGATION POUR LA DOCTRINE DE LA FOI, *Normae de delictis Congregationi pro Doctrina Fidei reservatis seu Normae de delictis contra fidem necnon de gravioribus delictis*, 21 mai 2010, dans *AAS*, 102 (2010), 419-434, traduction française dans *DC*, 2452 (2010), 760-764, art. 14.

teur, à moins d'avoir reçu la dispensation formelle du Saint-Siège.⁴⁰ Une autre partie de la doctrine réfute cet argument sur la base que cette exigence n'est requise nulle part en droit canonique. Ainsi l'enquêteur ne doit pas obligatoirement être un prêtre, ni un homme⁴¹.

2.2 — La figure du notaire

Le c. 484 énumère les fonctions de l'office de notaire : il doit rédiger les actes et les documents juridiques (décrets, les ordonnances) ; dresser fidèlement par écrit les procès-verbaux des affaires, les signer avec la mention du lieu, du jour, du mois et de l'année ; fournir, en observant les règles, les actes ou les documents tirés des registres et légitimement réclamés, déclarer la conformité de leurs copies à l'original. Bien que nous ne soyons pas encore dans un procès pénal formel, et que le code n'affirme pas clairement qu'il faille un notaire lors de la procédure de l'enquête préliminaire, il faut se rendre à l'évidence que les actes (documents, dépositions, décret d'ouverture...) de cette procédure ont bien besoin d'être signés *ad validitatem* (c. 1437). De plus, lors des rencontres formelles de l'enquêteur avec des témoins, le notaire enregistre les affirmations et les retranscrit. Ces raisons et bien d'autres nous amènent à épouser l'idée selon laquelle avec la présence du notaire à cette phase est requise⁴².

Le notaire peut être un clerc ou un laïc. Le c. 483, § 2 affirme non seulement que le chancelier et les notaires doivent être de réputation intacte et au-dessus de tout soupçon ; mais aussi que « dans les causes où la réputation d'un prêtre pourrait être mise en question, le notaire doit être prêtre ». On peut justifier cette exigence par le souci de protéger la nature confidentielle de la procédure. Le *CCEO* au c. 253, § 2 étend cette exigence aux cas où les diacres sont impliqués. De même, s'agissant des délits les plus graves, l'art. 12 de la *SST* requiert que les notaires soient prêtres.

Toutefois, le c. 483, § 2 ne fait pas de l'exigence d'un prêtre-notaire, une condition pour la validité. Par contre une absence totale de notaire affecte la

⁴⁰ Voir F.G. MORRISSEY, « Necessity of Priest-Notary During Preliminary Investigation », dans *CLSA AdOp3*, 149-150. Voir aussi W.H. WOESTMAN, *Ecclesiastical Sanctions and the Penal Process. A Commentary on the Code of Canon Law*, Ottawa, Saint Paul University, 2003, 157 (= WOESTMAN, *Ecclesiastical Sanctions and the Penal Process*).

⁴¹ Voir P.R. LAGGES, « The Penal Process: The Preliminary Investigation in the Light of the Essential Norms of the United States », dans *StC*, 38 (2004), 398-399 (= LAGGES, « The Penal Process », 398-399).

⁴² Voir P.L. GOLDEN, « Necessity of Priest-Notary During Preliminary Investigation », dans *CLSA AdOp3*, 147-148 (= GOLDEN, « Necessity of Priest-Notary »).

validité de la procédure. Selon l'art. 18 de la *SST*, la violation des lois simplement procédurales par les tribunaux inférieurs peut faire l'objet d'une *sanatio* si cette violation n'affecte pas le droit de la défense. Par ailleurs, la CDF, a reçu de Jean-Paul II la faculté de dispenser de l'exigence d'un prêtre-notaire et admettre qu'une personne non prêtre soit notaire dans une cause où la réputation d'un prêtre serait mise en question. Qu'en est-il du déroulement de l'enquête préliminaire ?

3 — *Le déroulement de l'enquête préliminaire*

Le c. 1717 du *CIC/83* ne fournit aucune prescription particulière sur la façon de mener cette enquête préliminaire. C'est une lacune qui mérite d'être comblée pour ne pas laisser cours à l'arbitraire. De toute manière l'enquêteur a besoin de collecter des indices ou des informations qui peuvent fonder ou infirmer la *notitia criminis* et déterminer l'imputabilité de la personne sous enquête préliminaire. Dans certains cas, l'accès au dossier personnel de cette dernière pourrait être utile à l'enquêteur s'il y découvre des éléments passés pouvant l'aider dans l'enquête actuelle⁴³. Tout ceci doit être fait en veillant à ne pas compromettre la bonne réputation du suspect (c. 1717, § 2).

3.1 — La collecte des indices

On pourrait avec Millette déterminer six types d'indices que l'enquêteur peut collecter⁴⁴. Le premier type d'indices renvoie aux déclarations des parties elles-mêmes (cc. 1530-1586). Un aveu (cc. 1535, 1537) fait par une partie est extrajudiciaire et n'a pas une valeur de preuve en soi ; le juge devra l'apprécier en relation avec les autres éléments de la cause ; mais une valeur probante plénière ne peut lui être reconnue à moins qu'il n'y ait d'autres éléments qui le corroborent pleinement (c. 1536, § 2). De même, selon le c. 1538, « Un aveu ou toute autre déclaration d'une partie n'a aucune valeur s'il s'avère qu'ils résultent d'une erreur de fait ou qu'ils ont été extorqués par la force ou par une crainte grave ».

Le second type d'indices est constitué des documents tant publics que privés. Parmi les documents publics on distingue : Des documents publics

⁴³ Voir SMILANIC, « Clergy Personnel Files », 196-197. Cet accès au dossier personnel de la personne sous investigation préliminaire supposerait que l'enquêteur en ait obtenu l'autorisation de l'Ordinaire.

⁴⁴ Voir MILLETTE, « An Analysis of the Preliminary Investigation », 162-165.

civils, établis par les lois de chaque pays et reçus par le législateur canonique (tels les documents judiciaires, les documents administratifs, les documents notariés) et des « documents publics ecclésiastiques », qui sont ceux qu'une personne publique autorise en vertu de sa fonction ecclésiastique et en respectant les formalités prescrites par le droit canonique (exemples : les documents qui émanent du Pontife romain, de la Curie romaine, des évêques et de leurs curies, des notaires ecclésiastiques, des notaires dans les actes judiciaires, des extraits des registres des sacrements).

Tous les autres documents sont considérés comme des documents privés (exemples : des testaments, des rapports, des lettres, des communications, des notes commerciales ; des documents représentatifs, comme les cartes, les tableaux, les plans). Les documents privés ont la même valeur probante que l'aveu extrajudiciaire. Par contre, à moins que des arguments contraires et évidents ne prouvent autre chose, les documents publics font foi pour tout ce qui y est directement et principalement exprimé (c. 1541). Dans la mesure du possible, ne doivent être acceptés que des documents originaux ou authentifiés⁴⁵.

Le troisième type d'indices renvoie aux témoins. Un témoin judiciaire est une personne digne de foi, étrangère à la dispute, distincte du tribunal et des parties, qu'on convoque pour déposer sur des faits qui sont en rapport avec l'objet du procès (cc. 1547-1573). Selon le c. 1548, § 1 ces témoins doivent dire la vérité. Ils doivent dans la pratique faire le serment (si possible) de dire la vérité (*de veritate dicenda*). Le c. 1548, § 2, 1° soustrait certaines personnes de l'obligation de répondre : les clercs, pour les choses qui leur ont été révélées à l'occasion de leur ministère sacré ; les magistrats civils, les médecins, les sages-femmes, les avocats, les notaires et toutes les personnes tenues au secret professionnel, y compris au titre de conseils donnés, pour tout ce qui relève de ce secret. Le c. 1548, § 2, 2° soustrait à l'obligation de répondre « les personnes qui craignent que leur témoignage n'entraîne pour elles-mêmes, leur conjoint, leurs proches parents ou alliés, discrédit, mauvais traitement dangereux ou autres maux graves ».

Le c. 1550, § 1 n'admet pas les mineurs de moins de quatorze ans et les faibles d'esprit à porter témoignage. Toutefois, ils peuvent être entendus sur décret du juge le déclarant expédient. Sont rendues incapables de témoigner : les personnes qui sont parties dans la cause ou ceux qui les représentent au procès, le juge et ceux qui l'assistent, l'avocat et les autres personnes qui assistent ou ont assisté les parties dans la même cause ; les prêtres, pour tout ce dont ils ont eu connaissance par la confession sacramentelle, même si leur

⁴⁵ Voir P.F. ROBINSON, « Collection and Evaluation of Proofs », dans DUGAN (dir.), *Towards Future Developments in Penal Law* », 128-129.

pénitent demande qu'ils parlent (c. 1550, §2). Les questions posées aux témoins doivent être brèves, adaptées à la compréhension du témoin (c. 1564). Ces derniers doivent prêter serment, signer leurs dépositions qui deviendront des preuves formelles dans un procès éventuel.

Le quatrième type d'indices est le témoignage des experts pour prouver un fait ou faire connaître la véritable nature d'une chose (cc. 1574-1581). Il sied de souligner qu'à ce niveau de la procédure, l'opinion des experts n'est pas toujours nécessaire puisque le procès pénal n'a pas encore commencé. La personne sous enquête n'est pas obligée de se soumettre à un test psychologique car cela est une violation de son droit à la vie privée⁴⁶.

Le cinquième type d'indices consiste dans la visite d'un lieu, la reconnaissance ou l'examen de quelque objet (cc. 1582-1583). Ceci permet de vérifier la véracité des allégations. Cette décision doit être prise par un décret dans lequel le juge indique sommairement, après avoir entendu les parties, ce qui devra être effectué au cours de ce transport sur les lieux.

Le sixième type d'indices consiste en la présomption des cc. 1584-1586. La présomption se définit comme la déduction probable à partir d'une chose incertaine ; la présomption du droit est celle fixée par la loi elle-même, et la présomption de la personne est celle conjecturée par le juge. Lors de l'enquête préliminaire, de simples conjectures, suppositions ou entendu-dire ne doivent pas être admis mais plutôt des présomptions de droit.

3.2 — La détermination de l'imputabilité du délit

Parmi les trois éléments mentionnés par le c. 1717, §1 qui composent le délit, figure l'imputabilité. Outre le devoir de mener une enquête prudente portant sur les faits et les circonstances⁴⁷ de la commission de l'éventuel délit, l'enquêteur doit aussi se poser la question de savoir dans quelle mesure la personne sous enquête préliminaire peut être l'auteur de ces actes ? Peut-elle en être punie ?⁴⁸ L'imputabilité se définit comme la propriété de l'acte

⁴⁶ Voir G.T. JORGENSEN, « Use of Expert and/or Expert Report in Penal Trial or Administrative Action », dans CLSA *AdOp*3, 357-360.

⁴⁷ Par circonstances il faut entendre les conditions objectives et subjectives dans lesquelles se trouvait le sujet : son âge (cc. 1323, 1° ; 1324, §1, 4°) sa capacité à faire usage de ses facultés mentales (cc. 1323, 6° ; 1324, §1, 1°, 2°) ; sa connaissance de sur le caractère illicite de ses actes ou de la loi (cc. 1323, 2° ; 1324, §1, 2° ; 1326, §1, 1°-3°) ; s'il était sous l'influence externe lors de la commission de l'acte illégal (cc. 1323, 3°, 4°, 5° ; 1324, §1, 2°, 3°, 5°, 6°, 7°). Ces éléments pourraient aggraver, diminuer ou exclure totalement la « punissabilité ». Voir DE PAOLIS et CITO, *Le sanzioni nella Chiesa*, 155-160.

⁴⁸ Voir ASTIGUETA, « L'investigazione previa », 221.

en vertu de laquelle le même acte peut être reconduit à la libre et consciente volonté du sujet⁴⁹. Elle renvoie à l'agent en tant qu'auteur déterminé de l'acte. Elle suppose un acte humain qui implique l'intelligence et la volonté de l'auteur. En d'autres termes, pour qu'il y ait imputabilité, le présumé fait délictueux doit être attribué à la personne non seulement comme auteur matériel, mais aussi comme auteur moral (conscient et doté d'une volonté) et responsable (c'est-à-dire capable de répondre de l'acte et des conséquences de l'acte devant Dieu, devant sa conscience, et selon les circonstances, devant la communauté humaine).

L'imputabilité doit être grave (c. 1321, § 1), faute de quoi un procès ne peut avoir lieu ni une peine imposée. Aussi, la personne qui par omission de la diligence requise viole la loi ou le précepte, ne sera pas punie, à moins que la loi ou le précepte n'en dispose autrement (c. 1321, § 2). Tel est aussi le cas d'une personne qui habituellement est privée de l'usage de la raison. Cette dernière est tenue pour incapable de délit même si elle viole une loi ou un précepte alors qu'elle paraissait saine d'esprit (c. 1322). Si théoriquement il est assez aisé d'admettre que l'imputabilité est un élément nécessaire pour qu'on puisse parler de délit, il est moins aisé dans la pratique de la prouver. L'enquêteur devra en dépit de pouvoir vérifier la capacité mentale de la personne sous enquête, se limiter à la présomption d'imputabilité du c. 1322, § 3 « à moins qu'il n'en apparaisse autrement ». Qu'en est-il des droits de la défense pendant l'enquête préliminaire ?

4 — *Les droits de la défense pendant l'enquête préliminaire*

L'affirmation des droits de la défense est communément admise dans un procès pénal proprement dit. Par contre, le fait que l'enquête préliminaire soit comprise en droit canonique comme n'étant qu'une procédure préalable au procès pénal et ne faisant pas techniquement partie du procès pénal lui-même, amène certains à affirmer que la personne suspectée n'a pas de droits de défense pendant l'enquête préliminaire. Il ne jouirait de ces droits que lorsque le procès pénal aurait effectivement commencé. En d'autres termes, le sujet de l'enquête préliminaire n'aurait apparemment aucun droit garanti,

⁴⁹ Voir P. PALAZZINI, art. « Imputabilità », dans P. PALAZZINI (dir.), *Dictionarium morale et canonicum*, Rome, Officium libri catholici, t. 2, 1965, col. 653 : « Imputabilitas est proprietas actus vel effectus vi cuius actus vel effectus homini tamquam vero auctori et domino tribui potest et debet ». Voir aussi V. DE PAOLIS, art. « Imputabilità », dans C. CORRAL SALVADOR, V. DE PAOLIS et G. GHIRLANDA (dir.), *Nouvo dizionario di Diritto canonico*, 2^e éd., Milan, San Paolo, 1996, col. 560-561.

il n'aurait pas « le droit de savoir qu'il est sous enquête ou pourquoi il est sous enquête, ni qui est la personne responsable de cette tâche »⁵⁰. Autrement dit, il n'aurait pas le droit d'accéder aux actes de l'enquête préliminaire pendant le déroulement de celle-ci. Ce raisonnement a conduit certains Ordinaires à penser que la personne sous enquête préliminaire n'aurait pas droit à un avocat ni même à un conseil juridique lors de cette procédure⁵¹. Cette position est difficile à justifier lorsque l'on sait que le droit de la défense est d'un droit naturel fondamental qui à notre avis doit être exercé à tout moment et surtout lorsqu'une des libertés ou des droits dont jouissent les personnes sont susceptibles d'être limités.

Il faut, en effet reconnaître que, si le c. 1717, § 1 affirme que l'enquêteur doit enquêter sur la réalité du fait et l'imputabilité juridique des délits allégués, il ne précise pas si la personne suspectée doit être informée de la nature et de l'auteur de l'allégation, ou s'il a droit à un conseil juridique pendant cette phase dite préliminaire. Ou encore s'il peut avoir accès aux actes de cette enquête. Ces points sont entre autres les axes nodaux du droit de la défense de toute personne humaine. Pour cette raison, ils méritent pour cela d'être examinés.

4.1 — La notification de l'ouverture de l'enquête préliminaire et la nature du délit allégué

Le *CIC/83* ne demande pas que le suspect soit mis au courant de la dénonciation. Par conséquent, toute l'enquête préliminaire pourrait se dérouler sans sa participation. Toutefois, on a du mal aujourd'hui à comprendre pourquoi une enquête, fût-elle préliminaire, serait menée à l'égard d'une personne sans qu'elle ne soit informée. Nonobstant toute la prudence que pourrait avoir l'enquêteur, il faut reconnaître qu'il y a un certain malaise lorsqu'un clerc, un religieux ou une religieuse contre qui pèsent les allégations, ignore qu'une enquête préliminaire est diligentée à l'endroit de sa personne, ou alors qu'une telle enquête a été menée à son sujet sans qu'il n'ait eu la moindre possibilité de s'expliquer quelle que soit l'issue de celle-ci. L'impression qui se dégage est qu'à l'égard de la personne soupçonnée, prévaut plutôt la présomption de culpabilité au détriment de la présomption d'innocence. Nous constatons que dans la pratique passée et même courante de certains tribunaux ecclésiastiques, règne une certaine logique du secret qui enveloppe très souvent cette

⁵⁰ GULIO, « Les raisons de la protection judiciaire », 150-160.

⁵¹ Voir P.R. LAGGES, « Appointment of Canonical Counsel », dans *CLSA AdOp3*, 353 (= Laggès, « Appointment of Canonical Counsel »).

phase de la procédure. Cette attitude qui consiste à maintenir le suspect dans l'ignorance totale d'une enquête ouverte à son endroit doit-elle être érigée en règle ? Ne va-t-elle pas à l'encontre d'une certaine transparence parfois nécessaire pour que surgisse la vérité et que la justice soit rendue ?

Aussi, si on conçoit aisément que la présence de la personne vers qui est dirigée l'allégation ne soit pas nécessaire au moment où l'on détermine la vraisemblance de l'allégation, on a du mal à comprendre pourquoi cette personne ne serait pas informée qu'une enquête préliminaire est ouverte pour déterminer la véracité des actes qu'elle aurait posés et leurs caractères délictuels. Déjà à cette étape, la personne pourrait apporter des éclaircissements ou des détails importants qui permettraient d'évaluer la *notitia criminis* et orienter le cours de l'enquête préliminaire si nécessaire.

On pourrait contre cet argument, affirmer qu'il y a un risque que la personne « brouille les pistes » et rende le déroulement de l'enquête préliminaire difficile. Ceci est possible comme dans d'autres systèmes juridiques. Néanmoins, une solution devrait être à notre avis d'intégrer cette possibilité et d'y prévoir une sanction (telle obstruction à la justice) et non de partir de cette possibilité pour décider de ne pas informer le suspect. Agissant de la sorte, comme mentionné plus haut, on laisse courir le risque de faire croire que la personne est présumée coupable et on ne lui permet pas de contribuer à la protection de sa réputation. C'est pourquoi, il faut convenir avec certains canonistes qu'à moins que des raisons graves n'y obligent, une personne qui fait l'objet d'une allégation devrait être notifiée de l'ouverture d'une enquête préliminaire à son endroit afin de lui permettre d'assurer son droit à la défense⁵².

Ce courant de pensée de la doctrine canonique est heureusement repris par la récente publication de la Conférence des évêques catholiques du Canada sur la *Protection des personnes mineures contre les abus sexuels*. En effet, dans la deuxième partie consacrée aux lignes directrices, traitant de l'enquête préliminaire, le § 3.5 dispose *mutatis mutandis*:

« [R]estant sauf le droit de la défense » (SST [2010], art. 18), il est de grande importance d'aviser l'agresseur présumé de l'allégation et de la preuve, et d'accorder à l'accusé la possibilité de se défendre (voir CIC, c. 1720, 1o, et CCEO, c. 1486, § 1, 1o) et de répondre à l'allégation. Si la tenue d'une procédure judiciaire pénale est ordonnée par la Congrégation pour la doctrine de la foi, le juge doit inviter l'accusé à se trouver un avocat;

⁵² Voir V. VONDENBERGER, « Balancing Rights: Role of the Promoter of Justice », dans DUGAN (dir.), *Towards Future Developments in Penal Law*, 70. L'auteur affirme que cette exigence était incluse dans le premier draft du CIC/83 mais avait été par la suite supprimée. Voir aussi RENKEN, *The Penal Law of the Roman Catholic Church*, 393.

s'il ne le fait pas, le juge lui-même doit nommer un avocat ex officio (cf. CIC, c. 1481, § 2 et 1723; CCEO, c. 1139 et 1474)⁵³.

Dans l'hypothèse où l'Ordinaire décidait de notifier au suspect sa décision d'ouvrir une enquête préliminaire à son égard, on pourrait poser la question du contenu de la notification ? Faut-il préciser la nature de l'allégation ? Il nous semble important que soit dite clairement à la personne quels sont les présumés délits pour lesquels est ouverte une enquête préliminaire. Une information générique et générale telle « une enquête préliminaire est ouverte contre vous » sans aucune autre précision serait non seulement irrespectueux de la santé mentale du sujet (équilibre psychologique), mais aussi une violation de son droit à la défense même si la personne n'est pas encore formellement accusée. Laisser cette dernière dans l'ignorance totale de ce qu'on lui reproche nous semble au jour d'aujourd'hui, assimilable à une procédure inquisitoire où le secret est le maître-mot et où il existe une disparité de pouvoir entre le juge accusateur et l'accusé⁵⁴.

4.2 — Le droit à la présomption d'innocence

Il n'existe malheureusement pas dans le CIC/83 un canon qui traite de la présomption d'innocence. Pourtant, depuis le XX^e siècle, l'adage « innocent jusqu'à preuve du contraire » jouit d'une place prépondérante dans plusieurs systèmes juridiques et est incorporé dans des instruments juridiques nationaux et internationaux de protection des droits humains⁵⁵. Il faut toutefois reconnaître qu'au XVI^e siècle, plusieurs lettres de la Curie romaine insistaient sur le droit d'un juif à une défense dans procès pour hérésie et apostasie. Déjà à cette époque, le droit d'user de tous les moyens légitimes pour

⁵³ CONFÉRENCE DES ÉVÊQUES CATHOLIQUES DU CANADA, *Protection des personnes mineures*, 100.

⁵⁴ Pour un bref aperçu des systèmes inquisitoire et accusatoire, voir J. LLOBELL, « L'équilibre entre les intérêts des victimes et les droits des accusés », dans DUGAN (dir.), *La procédure pénale et la protection des droits*, 115-118 (= LLOBELL, « L'équilibre entre les intérêts ») ; W. RICHARDSON, *The Presumption of Innocence in Canonical Trials of Clerics Accused of Child Sexual Abuse: An Historical Analysis of the Current Law*, Leuven, Peeters, 2011, 56-115.

⁵⁵ Voir K. PENNINGTON, « Innocent jusqu'à preuve du contraire : Les origines d'un adage juridique », dans DUGAN (dir.), *La procédure pénale et la protection des droits*, 43 (= PENNINGTON, « Innocent jusqu'à preuve du contraire »). L'auteur affirme aussi que selon les experts, cet adage est fermement établi dans la jurisprudence anglaise depuis les temps anciens. Voir pour quelques instruments internationaux : ASSEMBLÉE GÉNÉRALE DES NATIONS UNIES, La Déclaration Universelle des droits de l'Homme de 1948, dans Doc. N.U. A/810 (1948), art. 11 ; La Convention européenne des droits humains de 1953, dans *Recueil des traités des Nations Unies*, 213 (1955), art. 6.

assurer sa défense était un prolongement des droits compris dans la maxime qui veut qu'on soit innocent jusqu'à preuve du contraire⁵⁶.

Dans le cadre de l'enquête préliminaire, il est important de ne pas perdre de vue que du début de cette procédure jusqu'à sa fin, la personne est présumée innocente. Cette présomption d'innocence à cette étape implique que malgré les indices qui seront rassemblés, la personne ne doit pas être traitée comme si elle avait été déclarée coupable. Ce principe fondamental de droit qu'est la présomption d'innocence de la personne sous enquête préliminaire a été récemment réaffirmé par la Conférence des évêques catholiques du Canada comme exigence nécessaire à la recherche de la vérité : « Sans aller à l'encontre de la présomption fondamentale d'innocence [...] les évêques et les supérieurs majeurs sont tenus d'entreprendre une enquête préliminaire en s'intéressant sincèrement à rechercher la vérité »⁵⁷.

4.3 — Le droit à la protection de la bonne réputation

Tout au long de l'enquête préliminaire, l'enquêteur doit au sens du c. 1717, §2, veiller à ne pas compromettre la bonne réputation du sujet de l'enquête. Le droit à la bonne réputation est un droit naturel fondamental et inaliénable protégé par le c. 220 et reconnu à tous les fidèles⁵⁸. Un moyen par lequel cette bonne réputation peut être protégée est celui du secret entendu comme devoir moral de ne révéler à personne les informations connues et reçues de manière confidentielle⁵⁹. Ce secret est pour Astigueta, un élément positif quoique parfois utilisé de manière erronée. Il protège l'intimité des personnes et veille à ce que la communauté ne soit pas scandalisée⁶⁰. Ce droit ne peut être illégitimement violé. Cette réputation peut être légitimement attaquée (en dehors d'une enquête préliminaire) par une sentence, par des actions prises en légitime défense, par des actions prises dans le but d'éliminer une nuisance au bien public et privé, par des actions prises

⁵⁶ Voir PENNINGTON, « Innocent jusqu'à preuve du contraire », 61-62.

⁵⁷ CONFÉRENCE DES ÉVÊQUES CATHOLIQUES DU CANADA, *Protection des personnes mineures*, 33-34 ; 36.

⁵⁸ Voir CIC/83, c. 220 : « Il n'est permis à personne de porter atteinte d'une manière illégitime à la bonne réputation d'autrui, ni de violer le droit de quiconque à préserver son intimité ». Voir aussi S.C.S. MADDINENI, *Explicit and Implicit Rights Common to All the Faithful in the Code of Canon Law*, thèse de doctorat, Ottawa, Université Saint Paul, 2018, 74-76. Pour la référence spécifique à l'enquête préliminaire, voir la page 76.

⁵⁹ Voir K. MARTENS, « Le secret dans la religion catholique », dans *RDC*, 52 (2002), 270-273.

⁶⁰ Voir ASTIGUETA, « L'investigazione previa », 217. Pour une brève historique du secret dans le droit canonique, voir U. RHODE, « Trasparenza e segreto nel diritto canonico », dans *Periodica*, 107 (2018), 467-479.

dans l'accomplissement d'une charge ou d'un office, par la révélation des informations dans une enquête canonique. C'est dire que pendant l'enquête préliminaire, l'enquêteur peut attenter légitimement à la bonne réputation quand il est à la recherche des informations en vue de protéger le bien commun⁶¹ (par exemple protéger la communauté d'un danger imminent).

Même si l'enquêteur peut légitimement porter atteinte à la bonne réputation de la personne sous enquête, il est toutefois tenu au secret de cet office qui dans cette procédure permet de protéger la bonne réputation de celle-ci. On peut déduire de ce secret d'office et au regard des cc. 127, 63 et 471, 2^o que toutes les personnes désignées pour cette procédure préliminaire sont aussi tenues au secret, de même, les informateurs⁶². Ce secret est aussi requis en cas de dénonciation touchant aux délits les plus graves. Il devient alors un secret pontifical qui ne s'applique qu'après que la dénonciation ait été envoyée à la CDF⁶³. Avant ce moment les délits les plus graves sont simplement soumis à la simple obligation naturelle de maintenir le secret⁶⁴.

On ne peut plus aujourd'hui, au vu des récents scandales des abus sexuels et de l'exigence de transparence⁶⁵ réclamée par la société,

⁶¹ Voir J.M. RITTY, « Balancing Rights of Accused Cleric and the Good of Community », dans CLSA *AdOp3*, 101-102 (= RITTY, « Balancing Rights »).

⁶² Voir J.P. BEAL, « To Be or Not to Be, That is the Question: The Rights of the Accused in the Canonical Process », dans CLSAP, 53 (1991), 84.

⁶³ Dugan énonce quelques raisons qui pourraient justifier le secret pontifical dans des cas de délits les plus graves (art. 30 de la SST): si ces délits étaient entièrement révélés d'une manière importune, ils pourraient soit heurter l'Église, détruire le bien public, ou atteindre ou droits individuels et/ou de la communauté. Voir P. DUGAN (dir.), « The Need to Know vs. Confidentiality: Do Pontifical Secret and the Clamoring of the Media Deny Canonical Rights? », dans *Towards Future Developments in Penal Law*, 18. Voir aussi W.H. WOESTMAN, « Secrecy Concerning Delicts », dans CLSA *AdOp3*, 83 (= WOESTMAN, « Secrecy Concerning Delicts »).

⁶⁴ Au moment où nous achevons la rédaction de cet article, il n'est pas inutile de noter que les participants au sommet sur la protection des mineurs commencé le 21 et achevé le 24 février 2018, se sont longuement interrogés sur la pertinence de la soumission des procédures canoniques au secret pontifical lorsqu'il s'agit des abus sexuels. C'est le nouveau cheval de bataille de Mgr Charles Scicluna, secrétaire adjoint de la Congrégation pour la doctrine de la foi et membre du comité organisateur du sommet sur les abus sexuels. Pour ce dernier, le secret pontifical « n'est pas une fin en soi ». « Ce qui était efficace dans le passé est contre-productif aujourd'hui ». Voir https://fr.aleteia.org/2019/02/25/le-secret-pontifical-au-cœur-des-échanges-sur-les-abus-sexuels/?utm_campaign=NL_fr&utm_source=daily_newsletter&utm_medium=mail&utm_content=NL_fr (26 février 2018).

⁶⁵ C'est pour faire preuve de transparence que certaines provinces jésuites aux États-Unis d'Amérique (« Central and Southern Province ») commencèrent au mois de décembre 2018 à publier les noms des prêtres pédophiles. Voir Le Monde, « États-Unis : l'ordre des jésuites publie à son tour les noms de prêtres pédophiles », <https://www.lemonde.fr/international/>

médiatisés et parfois mise en œuvre par les instances civiles, évoquer la notion de secret sans recevoir de vives critiques et de devoir s'expliquer sur le contenu réel de ce terme qui a de nos jours une connotation négative⁶⁶. Millette affirme que le « secret » dans sa meilleure acception réfère à la confidentialité professionnelle car il n'a pas pour but de cacher la vérité mais plutôt de préserver la bonne réputation des personnes impliquées ainsi que le bien commun.

La mauvaise conception de l'entière transparence exigée par les mouvements sociaux, les mass media et autres, poursuit-il, résulte en la violation du droit naturel à la bonne réputation et du droit à la vie privée⁶⁷. Laquelle violation est amplifiée lorsque les noms des personnes coupables des délits sexuels et ceux sujets d'allégation de même genre sont publiés sur internet⁶⁸. Cette transparence serait aveugle et attenterait aux droits individuels sous prétexte de protéger le bien commun. Ce dernier n'est jamais atteint dans la négation des premiers. La manière dont la notion de transparence est actuellement mise en pratique est inconciliable avec le droit canonique qui affirme

article/2018/12/18/etats-unis-l-ordre-des-jesuites-publie-a-son-tour-les-noms-de-pretres-pedophiles_5399025_3210.html (6 janvier 2019). Astigueta citant des exemples similaires fustige cette conception de la transparence identifiée de manière erronée à la possibilité de rendre publique par n'importe quel moyen tout ce qui se réfère aux abus sexuels sur des personnes mineures. Voir ASTIGUETA, « L'investigazione previa », 217-218. Cette pratique, affirme-t-il, désormais habituelle aux États-Unis d'Amérique constitue une grave violation du droit à l'intimité. Voir IDEM, « Trasparenza e segreto: Aspetti della prassi penalistica », dans *Periodica*, 107 (2018), 523 (= ASTIGUETA, « Trasparenza e segreto »). Pour Perlasca le concept de transparence provient de l'ordonnancement étatique et présuppose la division des pouvoirs (législatif, exécutif et judiciaire). Son utilisation en droit canonique doit se faire de manière consciente et vigilante. Voir A. PERLASCA, « Trasparenza e riservatezza nella gestione dei beni ecclesiastici », dans *Periodica*, 107 (2018), 494-498 (= PERLASCA, « Trasparenza e riservatezza »). Dans sa lettre du 15 septembre 2016, Coccopalmerio affirme que la pratique de la publication des noms des clercs condamnés au for civil ou ecclésiastique pour cause d'abus sur des personnes mineures ne peut être considérée comme une règle générale, car elle est contraire au c. 220. Toutefois, il y a lieu d'évaluer au cas par cas le bien que la protection de la bonne réputation représente et le mal que la personne condamnée pourrait infliger à la communauté si son nom n'était pas dévoilé. Voir COMMISSION PONTIFICALE POUR LES TEXTES LÉGISLATIFS, « Canon 220 : Publication of Names of Condemned Clerics in Civil or Ecclesiastical Processes Due to Abuse of Minors », dans *RR* 2017, 5-9.

⁶⁶ Voir G.P. MONTINI, « La Chiesa tra l'impegno per la trasparenza et la tutela del segreto : Alcune conclusioni al termine della giornata di studio », dans *Periodica*, 107 (2018), 538. Perlasca préfère le terme de « riservatezza » à celui de secret. Voir PERLASCA, « Trasparenza e riservatezza », 493.

⁶⁷ Voir MILLETTE, « An Analysis of the Preliminary Investigation », 167; WOESTMAN, « Secrecy concerning Delicts », 83.

⁶⁸ Voir ASTIGUETA, « L'investigazione previa », 202.

que la loi doit être interprétée de manière stricte en cas de restriction des droits. L'effet de la transparence actuelle serait la destruction de la réputation d'une personne avant même la phase du procès ou avant celle de l'enquête préliminaire⁶⁹.

Les développements ci-dessus montrent qu'il existe une réelle tension entre l'exigence de divulguer les informations au grand public – surtout dans des cas d'abus sexuels sur des personnes mineures – et l'obligation de respecter la confidentialité qui permet de garantir la présomption d'innocence et protège la bonne réputation du suspect. Aussi, la confidentialité de l'enquête préliminaire canonique, permet d'assurer la sécurité des témoins et des victimes, de préserver l'efficacité des enquêtes en cours, d'éviter ainsi la diffusion des pièces du dossier d'enquête à ceux qui n'y ont pas directement et légitimement intérêt⁷⁰.

S'il faut convenir que de nos jours « il est important de reconnaître que la transparence est un défi qui doit être relevé le plus généreusement possible afin que la confiance perdue soit rétablie »⁷¹, il ne faut pas non plus sacrifier les règles de procédure canoniques liées à la confidentialité et au droit de la défense qui peuvent permettre de parvenir à un procès équitable, à une justice faite sans pression aucune. Même si les règles processuelles se sont pas des fins en soit, mais sont au service de la justice⁷², il nous semble néanmoins qu'un « juste milieu » entre la transparence ou la demande de divulgation publique d'information et le respect des obligations liées à confidentialité est encore à rechercher.

La nécessité de parvenir à ce « juste milieu » ou à cet équilibre est mise en relief par le récent document de la Conférence épiscopale du Canada où il est recommandé aux évêques et aux supérieurs majeurs « de tenir la collectivité informée dans les meilleurs délais de l'évolution de la situation pendant l'enquête préliminaire, tout en respectant les obligations d'application régulière de la loi et de confidentialité »⁷³. C'est aussi, nous semble-t-il, ce que souligne Astigueta qui, parlant de quelques aspects de la pratique du droit pénal, emploie les concepts de « saine » transparence et de « sain »

⁶⁹ Voir RITTY, « Balancing Rights », 101-104, 116.

⁷⁰ Pour éviter tout préjudice aux parties, les juges et les ministres du tribunal sont tenus, selon les termes du c. 1455, § 1, de garder le secret inhérent à leur charge. Ce secret peut être déferé en certains cas sous la foi du serment aux témoins, aux experts, aux parties et à leurs avocats et procureurs (c. 1455, § 3).

⁷¹ CONFÉRENCE DES ÉVÊQUES CATHOLIQUES DU CANADA, *Protection des personnes mineures*, 80.

⁷² Voir VERNAY, « Les procès dans le Code », 347.

⁷³ CONFÉRENCE DES ÉVÊQUES CATHOLIQUES DU CANADA, *Protection des personnes mineures*, 149, leçon 3, n° 20.

secret. Effectivement, une transparence non saine lèse le droit à la bonne réputation que le secret protège ; de même, ne pas communiquer le nom de la victime des abus peut léser le droit à la défense. Le secret et la transparence sont des instruments qui ont pour but de garantir la justice processuelle et pastorale⁷⁴.

Le souci de protection de la bonne réputation de la personne sous enquête préliminaire veut que l'enquête se fasse de manière efficace et rapide afin de permettre à la personne d'être réintégrée dans le ministère au cas où elle en avait été retirée provisoirement durant l'enquête préliminaire. Plus son absence du ministère est prolongée, plus il devient difficile de restaurer la réputation de la personne et de la réintégrer de manière bénéfique.

L'enquête préliminaire, si faite sans perdre de vue la présomption d'innocence, doit être accompagnée de l'intention de rendre justice à la personne. Cette personne a le droit de voir sa bonne réputation rétablie (restaurée) au sens du c. 128 : « Quiconque cause illégitimement un dommage à autrui par un acte juridique ou encore par un autre acte quelconque posé avec dol ou faute, est tenu par l'obligation de réparer le dommage causé ». Par ailleurs, la personne sous enquête préliminaire a le droit de demander que la personne qui a fait une dénonciation calomnieuse et a porté atteinte à sa bonne réputation en soit punie (cc. 1390, § 2, 1400).

4.4 — Le droit à un conseil juridique ?

La personne sous enquête préliminaire a-t-elle droit à un conseil juridique/canonique ? S'il est vrai qu'elle n'a pas techniquement droit à un avocat, la quasi-unanimité des canonistes s'accorde pour dire qu'elle a droit à un conseil juridique⁷⁵ car bien que le décret ouvrant l'enquête préliminaire soit plus centré sur le délit que sur la personne, on ne peut éluder le fait que cette enquête commence à empiéter sur les droits de la personne concernée. Ce droit à un conseil juridique suppose celui de recevoir un soutien financier de l'Ordinaire afin de payer les services de ce conseil. Puisque ce conseil n'est pas un avocat, nul n'est besoin d'obtenir l'approbation de l'Ordinaire. Ce conseil canonique peut être présent aux réunions de la « Review board »

⁷⁴ ASTIGUETA, « Trasparenza e segreto », 534-535.

⁷⁵ Voir P.L. GOLDEN, « Appointment of a Canonical Counsel », dans CLSA *AdOp3*, 352-353; LAGGES, « Appointment of Canonical Counsel », 353-354. Voir FOLEY, « Preliminary Investigation », 43.

(USA) et suggérer des indices⁷⁶ à être collectés par l'enquêteur⁷⁷. C'est dans cette optique que l'art. 6 des Normes essentielles⁷⁸ encourage les personnes sous enquête préliminaire à solliciter les services d'un conseiller aussi bien civil que canonique.

De même, parmi les « recommandations et exigences » de la Conférence des évêques catholiques du Canada, figure celle « d'informer le délinquant présumé de l'enquête préliminaire et de son droit à l'assistance d'un avocat (en droit canonique et en droit séculier) et de la possibilité de solliciter les conseils d'un directeur spirituel et d'un psychologue pendant l'enquête préliminaire »⁷⁹. Cette assistance juridique, spirituelle et psychologique à la personne sous enquête préliminaire devrait être octroyée non seulement dans des cas de délits sexuels impliquant des personnes mineures, mais aussi dans des situations où l'on enquête sur la commission probable d'autres délits canoniques.

⁷⁶ Comme le souligne si bien Millette, il est préférable de ne pas employer le terme « preuve » car l'enquêteur ne recherche pas à prouver le cas mais à collecter suffisamment d'indices appropriés (« indications ») qui permettront à l'Ordinaire de décider si un procès pénal devrait ou non être initié. Nous utilisons donc le terme indice pour souligner justement que l'enquête préliminaire vise à collecter des « éléments » qui pourraient dans le cas d'un procès pénal devenir des preuves qui indiquent la culpabilité. Il faut reconnaître que ces indices sont généralement similaires aux preuves collectées dans le procès pénal (cc. 1530-1586). Voir MILLETTE, « An Analysis of the Preliminary Investigation », 162.

⁷⁷ P.R. LAGGES, « Elements of the Preliminary Investigation », dans P. DUGAN (dir.), *Advocacy Vademecum*, Montreal, Wilson & Lafleur, 2006, 162-163 (= LAGGES, « Elements of the Preliminary Investigation »). La conférence des évêques catholiques du Canada recommande la constitution d'« un comité consultatif multidisciplinaire (composé d'une victime, d'un psychologue, d'un directeur spirituel, d'un canoniste, d'avocats, d'un courtier d'assurance, d'un agent des forces de l'ordre, d'un travailleur social, d'un professionnel des communications, etc.) pour assurer que la réponse et le suivi sont complets et tout à fait conformes aux normes du Saint-Siège, aux présentes Lignes directrices de la Conférence des évêques catholiques du Canada, au protocole diocésain local, aux lois fédérales, provinciales et territoriales pertinentes, aux exigences des assureurs et aux meilleures pratiques en la matière ». CONFÉRENCE DES ÉVÊQUES CATHOLIQUES DU CANADA, *Protection des personnes mineures*, 35, 148. Ce comité consultatif travaillera en collaboration avec le délégué et son adjoint pour proposer une décision éclairée selon la probabilité des faits et la vraisemblance de l'allégation. Ibid., 104, § 4.2.

⁷⁸ Voir UNITED STATES CONFERENCE OF CATHOLIC BISHOPS, *Essential Norms for Diocesan/Eparchial Policies Dealing with Allegations of Sexual Abuse of Minors by Priests or Deacons*, dans *Origins*, 32 (2002-2003), 415-418, traduction française dans *DC*, 2291 (2003), 432-435.

⁷⁹ CONFÉRENCE DES ÉVÊQUES CATHOLIQUES DU CANADA, *Protection des personnes mineures*, 35 et 149.

4.5 — L'interrogation du suspect et l'accès aux actes de l'enquête

Bien que l'enquêteur n'ait pas une obligation canonique claire d'interroger le suspect, on peut affirmer que pour mieux respecter le droit de la défense, il doit le faire ne serait-ce que pour se faire une idée de « la solidité » de l'allégation et commencer à appréhender l'existence ou non de la *mens rea*. On pourrait affirmer que parce que les droits pourraient être lésés, il doit être consulté (c. 50). Il est vrai, la personne sous enquête n'est pas obligée d'accepter l'interrogation ou encore de prêter serment selon le c. 1728, § 2⁸⁰.

À la question de l'accès au dossier de l'enquête préliminaire par le sujet de l'enquête préliminaire ou par son conseil juridique, la doctrine canonique n'est pas unanime. Pour certains (par exemple la USCCB : United States Conference of Catholic Bishops), le droit à l'accès à ces actes n'existe pas à la phase de l'enquête préliminaire puisque nous ne sommes pas encore dans le procès lui-même. D'autres, par contre, affirment qu'il s'agit d'un droit naturel et que la personne doit être autorisée à avoir accès au dossier de l'enquête afin de défendre ses droits. S'il est nécessaire, un acte de confidentialité pourrait être signé entre l'Ordinaire et le conseil de la personne sous enquête avant que l'accès ne lui soit accordé⁸¹. Si nous partons du présupposé que dans les procès canoniques, toutes les parties doivent concourir à la recherche de la vérité⁸², il faut admettre que pour que la personne sous enquête préliminaire puisse participer de manière efficace à la recherche de la vérité, il est important qu'elle accède aux éléments du dossier. Sa réaction éclairée et avisée pourra alors aider l'Ordinaire à décider de l'ouverture ou non d'un procès pénal.

4.6 — La question de la révélation de l'identité de l'auteur de l'allégation et le droit d'être consulté avant toute décision

Faut-il dans le cas où la *notitia criminis* arrive par une dénonciation ou une lettre écrite dévoiler l'identité de l'auteur de l'allégation ? Il nous semble judicieux que le sujet de l'enquête préliminaire connaisse l'auteur des allégations portées contre lui. Le droit de défense, même si nous ne sommes qu'à

⁸⁰ Voir GOLDEN, « Necessity of Priest-Notary », 122-123.

⁸¹ Voir MILLETTE, « An Analysis of the Preliminary Investigation », 158. Voir LAGGES, « Elements of the Preliminary Investigation », 160; J.M. RITTY, « Confidentiality Agreement », dans P. DUGAN (dir.), *Advocacy Vademecum*, Montréal, Wilson & Lafleur, 2006, 187-188.

⁸² Voir A. BAMBERG, « *Pro rei veritate* ! : Pratique judiciaire canonique et recherche de la vérité », dans *RDC*, 62 (2012), 341-342.

la phase de l'enquête préliminaire serait violé si l'identité de la personne n'est pas dévoilée. Toutefois, dans les cas où la sécurité de l'auteur de l'allégation pourrait être en risque, on pourrait ne pas dévoiler immédiatement l'identité de l'auteur de l'allégation afin de ne pas rendre plus difficile l'enquête préliminaire⁸³. Mais même dans ce cas, il est à notre avis, prudent de bien jauger l'existence réelle de la menace où du risque. En effet il paraît trop facile de porter de graves accusations sur un clerc, religieux ou une religieuse et de demander par la suite que l'anonymat soit préservé. Nous pensons que l'enquêteur doit scrupuleusement évaluer la menace réelle, son contexte, et ne pas céder à de simples caprices du dénonciateur qui requiert l'anonymat sans raison fondée. Derrière la quête d'anonymat, peuvent se cacher une personnalité manipulatrice. La connaissance de l'identité de cette dernière peut permettre à la personne sur qui pèse les allégations d'apporter certaines informations précieuses sur la crédibilité de l'auteur des allégations.

Dans le cas spécifique des délits les plus graves contre la sainteté du sacrement de pénitence réservés au jugement de la CDF et particulièrement dans la situation d'absolution du complice contre le sixième commandement du décalogue ; l'art. 24, § 1 de la *Sacramentorum sanctitatis tutela* (version rénovée du 21 mai 2010) déclare : « Dans les causes pour les délits dont il s'agit à l'art. 4 § 1, le Tribunal ne peut rendre public le nom du plaignant ni à l'accusé ni même à son avocat, à moins que le plaignant n'ait donné son consentement explicite ». Ici également, se pose la question de savoir comment un prêtre pourrait pratiquement se défendre contre une telle allégation si ni lui, ni son avocat ne peuvent connaître l'identité de l'auteur de l'accusation. Assurer le droit de la défense dans ces conditions est d'autant plus difficile aussi bien au niveau de l'enquête préliminaire que lors du procès quand on sait que le prêtre ne peut violer le secret sacramentel en dévoilant le contenu de la confession.

De surcroît, le prêtre ne peut faire usage des connaissances acquises en confession pour se défendre (c. 984, § 1). Bien que le même art. 24, au § 2 requière du tribunal une attention particulière dans l'évaluation de la crédibilité du plaignant, on peut légitimement se demander comment est-ce que le tribunal parviendra à une telle évaluation lorsque qu'il se prive des éléments d'évaluation sur la crédibilité du plaignant que pourrait apporter la défense ? Cette dernière ne pourrait véritablement apporter ces éléments que si elle a l'identité du plaignant. Sans cet apport précis de la défense, sur la crédibilité du plaignant, l'évaluation du tribunal ne risque-t-elle pas d'être partielle ?

⁸³ Voir A. MIZIŃSKI, « L'indagine previa », dans Z. ZUCHECKI, *Il processo penale canonico*, Rome, LUV, 2003, 193.

Le droit d'être consulté avant une prise de décision par l'Ordinaire trouve sa justification dans le fait que les droits de la personne sous enquête préliminaire pourraient être lésés par la décision envisagée (c. 50). Le législateur canonique de 1990 pour les Églises Orientales l'affirme clairement au chapitre 1 du Titre XXVIII lorsqu'il traite de l'enquête préalable : « Avant d'émettre une décision quelconque en l'affaire, le Hiérarque entendra au sujet du délit l'accusé, et le promoteur de justice ainsi que, s'il l'estime prudent, deux juges ou d'autres experts en droits[...] ». Cette consultation pourrait être faite avant ou après que les indices aient été collectés et les témoins interviewés. Pratiquement, ceci revient à dire que l'interrogatoire canonique du sujet doit figurer dans le dossier d'enquête préliminaire, à moins que celui-ci ait expressément refusé de se prononcer par rapport aux allégations. Dans ce cas, il nous paraît judicieux qu'une mention écrite de ce refus soit faite dans les actes.

4.7 — Droits pendant le temps de retrait provisoire du ministère

Nous employons ici les expressions de « retrait provisoire du ministère » pour désigner le concept d'« Administrative leave » emprunté du système étatique et fréquemment utilisé dans la sphère canonique de langue anglaise. Ce retrait provisoire du ministère est aussi qualifié de « suspension temporaire »⁸⁴, de « congé administratif » ou encore de « suspension temporaire des facultés d'exercice du ministère »⁸⁵. En effet, ce concept réfère aux mesures prudentielles utilisées au cours d'un procès pénal. Ces mesures peuvent étre restrictives et prohibitives mais ne sont pas des peines. Elles sont des mesures pastorales prises pour assurer le bien des fidèles et le bon déroulement de la justice⁸⁶. Ces mesures consistent à écarter la personne « accusée » du ministère sacré, d'un office ou d'une charge ecclésiastique, lui imposer ou lui interdire le séjour dans un endroit ou un territoire donné, ou même lui défendre de participer en public à la très sainte Eucharistie. Il concept d'« Administrative leave » ne renvoie pas au concept canonique de « suspension » qui est une censure qui peut seulement être appliquée aux clercs après que ces derniers aient reçus la monition et néanmoins demeurent dans la contumace (cc. 1333, 1347).

⁸⁴ Voir J.P. BEAL, « Administrative Leave : Canon 1722 Revisited », dans *StC*, 27 (1993), 295 (= BEAL, « Administrative Leave »).

⁸⁵ CONFÉRENCE DES ÉVÊQUES CATHOLIQUES DU CANADA, *Protection des personnes mineures*, 109, 4.8.

⁸⁶ Voir WOESTMAN, *Ecclesiastical Sanctions and the Penal Process*, 170.

La notion d'« Administrative leave » n'est pas non plus équivalente au c. 1722 *CIC/83*⁸⁷ car sa formulation laisse clairement entrevoir que ces mesures prudentielles ne peuvent être prises qu'au cours du procès pénal, c'est à dire après l'enquête préliminaire ayant permis l'identification des indices⁸⁸. Le *CIC/17* allait dans ce sens et le c. 1958 affirmant que les mesures prudentielles ne pouvaient être appliquées qu'après que l'enquête préliminaire soit achevée⁸⁹. Ce Code avait cependant des prévisions spécifiques pour l'application des mesures prudentielles en dehors du procès pénal⁹⁰. Ces prévisions ont été retirées du *CIC/83*. Le *CCEO* dans son c. 1473 affirme que les mesures prudentielles ne peuvent être prises qu'à l'intérieur d'un procès pénal judiciaire. Tout semble donc indiquer que l'intention du législateur universel est que les « Administrative leave » ne soient imposées qu'en lien avec un procès pénal et après la conclusion de l'enquête préliminaire.

Or dans la pratique, ces mesures sont souvent mises en œuvre avant ou durant l'enquête préliminaire. Ceci, dans le cas des États-Unis d'Amérique est d'ailleurs fait en toute légalité. En effet, l'art 6 des *Normes Essentielles*, loi particulière aux États-Unis d'Amérique, demande aux Évêques d'appliquer des mesures prudentielles du c. 1722 quand il y a suffisamment d'indices d'abus sexuel sur une personne mineure. Une autre exception au c. 1722 est l'art. 19 de la *SST* qui permet aux Ordinaires d'appliquer des mesures prudentielles du c. 1722 dès le début ou pendant l'enquête préliminaire pour ce qui est des délits graves réservés à la CDF⁹¹. La Conférence

⁸⁷ Voir *CIC/83*, c. 1722 : « Pour prévenir des scandales, pour protéger la liberté des témoins et garantir le cours de la justice, après avoir entendu le promoteur de justice et l'accusé lui-même, l'Ordinaire peut à tout moment du procès écarter l'accusé du ministère sacré ou d'un office ou d'une charge ecclésiastique, lui imposer ou lui interdire le séjour dans un endroit ou un territoire donné, ou même lui défendre de participer en public à la très sainte Eucharistie; toutes ces mesures doivent être révoquées dès que cesse le motif, et prennent fin quand le procès pénal est achevé ».

⁸⁸ Voir V. De PAOLIS, « Les sanctions pénales, les mesures pénales et les pénitences dans le droit canonique », dans DUGAN (dir.), *La procédure pénale et la protection des droits*, 209.

⁸⁹ Voir *CIC/17*, c. 1958 : « Les décrets dont il est question aux cans. 1956-1957 ne peuvent être prononcés qu'après la citation de l'accusé, sa comparution ou sa contumace, soit après sa première audition, soit ultérieurement dans le cours du procès; aucun recours n'est donné contre ces mêmes décrets ».

⁹⁰ Voir *CIC/17*, c. 2222, § 2 : « Dans le cas d'un délit seulement probable, ou certain mais couvert par la prescription, le supérieur légitime a le droit et même le devoir de ne pas promouvoir aux ordres un clerc dont l'idonéité est douteuse et, pour éviter le scandale, d'interdire à un clerc l'exercice du saint ministère, ou même de lui retirer son office, conformément au droit. Ces mesures n'ont pas le caractère de peines ».

⁹¹ Selon P.J. Cogan, avant ou pendant l'enquête préliminaire, le précepte est utilisé pour faire appliquer le c. 1722 alors qu'après l'enquête préliminaire, c'est plutôt un décret qui est utilisé. Voir P.J. COGAN, « Precept Imposing Administrative Leave », dans *CLSA AdOp3*, 476-477.

des évêques catholiques du Canada abonde dans le même sens. Pour des cas d'abus sexuels sur des personnes mineures, elle demande aux Évêques et aux supérieurs majeurs de limiter l'exercice du ministère de « l'accusé » en le mettant en « congé administratif »⁹².

Ces mesures prudentielles, convient-il de le rappeler, ne sont pas de véritables peines, mais des mesures pastorales. Cependant puisqu'elles résultent à restreindre les droits, le c. 1722 doit faire l'objet d'une interprétation stricte (c. 18)⁹³ et ne doit être appliqué que pour des raisons énumérées par ce même canon : prévenir des scandales, protéger la liberté des témoins et garantir le cours de la justice⁹⁴. Cela suppose que l'Ordinaire procède à une évaluation équilibrée de l'existence réelle du scandale ainsi que celle de l'opportunité de protéger les témoins. Si ces derniers peuvent être protégés par un percept pénal, les restrictions du c. 1722 ne seront plus nécessaires⁹⁵. L'application des mesures du c. 1722 doit donc se faire seulement quand cela est nécessaire, selon le droit, après avoir entendu le promoteur de justice et l'accusé⁹⁶, et pour une courte durée, puisqu'elles entachent la réputation de la personne sous enquête⁹⁷.

⁹² Voir CONFÉRENCE DES ÉVÊQUES CATHOLIQUES DU CANADA, *Protection des personnes mineures*, 34 et 108, § 4.8 : « Le protocole devrait prévoir un mécanisme par lequel, une fois l'enquête préliminaire commencée, l'ordinaire évalue systématiquement les mesures canoniques à appliquer à l'égard d'une personne à qui la perpétration d'abus sexuels est reprochée (voir en particulier *CIC*, c. 1722, et *CCEO*, c. 1473) ».

⁹³ Voir J.M. HUELS, « Ecclesiastical Laws », commentaire du c. 18, dans *CLSA Comm2*, 76.

⁹⁴ L'interprétation stricte implique, selon Daly, que l'Ordinaire ne peut restreindre tous les droits de la personne, mais seulement ceux spécifiquement mentionnés dans le c. 1722. Ainsi il ne peut, par exemple, restreindre la liberté du prêtre de dire la messe en privé ou l'interdire d'absoudre des pénitents en danger de mort. Voir B. DALY, « Placing a Priest on *Administrative Leave* during the Investigation of Alleged Misconduct », dans *CLSA AdOp3*, 474.

⁹⁵ Voir BEAL, « Administrative Leave », 314-315. S'agissant de l'existence réelle du scandale pour justifier les mesures restrictives, F. Morrissey fait état qu'une jurisprudence de la CDF qui demanda à l'Ordinaire de réintégrer le prêtre dans un ministère public car l'allégation présente d'un délit qui se serait déroulé plusieurs années antérieures n'est plus l'objet de scandale aujourd'hui étant donné que le prêtre en question bénéficie d'une bonne considération de la part du peuple. VOIR MORRISSEY, « Penal Law in the Church Today », 51-52.

⁹⁶ Entendre dans le cadre de l'enquête préliminaire, l'enquêteur et le suspect.

⁹⁷ Voir BEAL, « Administrative Leave », 316-319. Pour l'historique et le signifié du concept d'« Administrative Leave » dans le *CIC/17* et de 83, voir *ibid.*, 299-315. L'auteur affirme par ailleurs à la page 313 que la *mens legislatoris* est que l'application de cette mesure doit être déferée jusqu'à la conclusion de l'enquête préliminaire et à l'approche du procès pénal. Affirmation qu'entérine LAGGES, « The Penal Process », 408. Golden pense le contraire et affirme qu'il recommande à ses clients d'accepter une telle mesure prudentielle avant la conclusion de l'enquête préliminaire. Voir P. GOLDEN, « Advocacy for Clerics Accused of Sexual Abuse of Minors », dans *CLSAP*, 68 (2006), 137-138. Ce débat est actuellement tranché puisque par l'art. 19 de la *SST* de 2010, le législateur donne aux Ordinaires la faculté d'appliquer les mesures prévues au c. 1722 *CIC/83* dès le début de l'enquête préliminaire.

De plus, on ne peut imposer des mesures prudentielles indéfiniment sans lien réel avec un procès car cela reviendrait à imposer une peine expiatoire perpétuelle sans un procès⁹⁸. De toute manière, aux termes du c. 1722, « toutes ces mesures doivent être révoquées dès que cesse le motif, et prennent fin quand le procès pénal est achevé ». En outre, pendant la durée du temps où les facultés sont enlevées, même s'il n'est pas encore formellement frappé d'une peine, le clerc doit être assisté financièrement de manière à ce qu'il puisse subvenir à son honnête subsistance selon le c. 1350. Lorsque le rapport de l'enquêteur est achevé, on *s'achemine vers la fin de l'enquête préliminaire*.

5 — *Le rapport de l'enquêteur, l'évaluation des indices et la fin de l'enquête préliminaire*

Une fois que l'enquêteur estime qu'il a suffisamment d'indices ou d'informations relatives aux allégations faisant l'objet de l'enquête préliminaire⁹⁹, il doit, même si le Code ne l'affirme pas explicitement, rendre compte par écrit à l'Ordinaire afin de lui permettre de prendre une décision éclairée. Le CIC/17 était plus explicite en cette matière et demandait au c. 1946, que l'enquêteur fournisse à l'Ordinaire les actes de l'enquête munis de son propre avis (*suffragium*)¹⁰⁰. On peut dire que dans la pratique, l'enquêteur doit rédiger un rapport sur l'issue de l'enquête préliminaire. Dans ce rapport, il doit pouvoir évoquer le fait qu'il a rencontré la personne sur qui pèse les allégations et dire quelle était la réponse de cette dernière, rappeler les noms des témoins interrogés et d'autres indices (c. 1719). Il nous paraît normal qu'il y mentionne son avis sur la subsistance de la vraisemblance ou non des faits pénalement illicites (*fumus delicti*) objets de l'enquête et enfin qu'il fasse cas de sa disponibilité au cas où l'Ordinaire souhaitait un supplément d'enquête¹⁰¹.

⁹⁸ Voir T.J. GREEN, « Restrictions on the Accused », commentaire du c. 1722, dans *CLSA Comm2*, 1812.

⁹⁹ Puisque l'enquête préliminaire doit être rapide sans une réelle détermination sur la culpabilité de l'auteur, les indices ramassés ne doivent être ni trop, ni peu. Ils doivent tout juste être suffisants pour permettre l'ouverture d'un procès. Voir CALABRESE, *Diritto penale canonico*, 147-148. L'enquêteur pourrait dans certain cas continuer à collecter des indices s'il y a un risque que ceux-ci disparaissent de manière permanente avec le passage du temps. Voir Bruno Fabio PIGHIN, *Diritto penale canonico*, Venice, Marcianum Press, 2008, 539.

¹⁰⁰ Voir CIC/17, c. 1946, § 1 : « À la fin de l'enquête, l'enquêteur fait un rapport à l'Ordinaire en y joignant son avis ».

¹⁰¹ C. PAPALE, *Formulario commentato del processo penale canonico*, Cité du Vatican, Urbaniana University Press, 2012, 24-25 (= PAPALE, *Formulario commentato*). Astigueta a un avis contraire et pense que, du fait que le c. 1717, § 3 equipare l'enquêteur à un auditeur et

Avant de rédiger un tel rapport qui normalement survient quand l'enquêteur estime avoir achevé ses enquêtes, il doit vérifier qu'un délit probable s'est produit dans un lieu et à une date ; que la personne sous enquête est probablement l'auteur de ce délit probable et finalement que la personne, probablement, en est gravement imputable. On ne parle ici que d'une probabilité car la certitude sur le délit et l'imputabilité de la personne ne sont pas atteintes lors de l'enquête préliminaire, les indices ou les éléments (c. 1718, § 1) rassemblés ne constituant pas véritablement des preuves au sens d'un procès pénal en soi. L'enquêteur doit établir une forte probabilité que la personne a effectivement commis le délit et en est gravement imputable. Autrement dit, il doit apporter suffisamment d'éléments au sens du c. 1719 pour étayer sa présomption de culpabilité. Ce niveau de certitude reste évidemment moindre par rapport à la certitude morale requise lors du procès pénal lui-même. En effet, l'enquête préliminaire n'établit pas la culpabilité, mais la probabilité de culpabilité qui sera plus tard confirmée ou rejetée au cas où un procès pénal est tenu. C'est en réalité au promoteur de justice que revient le rôle de prouver la culpabilité de la personne lors du procès et non à l'enquêteur¹⁰².

Le rapport de l'enquêteur est en principe acheminé à l'Ordinaire sauf dans le cas particulier des USA, où s'il s'agit des allégations contre des personnes mineures, l'enquêteur doit faire parvenir son rapport au comité d'évaluation diocésain (« Review Board »)¹⁰³. Ce dernier de manière formelle et motivée, doit présenter des recommandations à l'Ordinaire dans lesquelles il l'informe sur la suffisance des indices pouvant justifier l'ouverture d'un procès. Une fois que l'Ordinaire a reçu soit le rapport de l'enquêteur soit celui de la « review board », il doit procéder à l'évaluation de tout le matériel reçu. Pour ce faire, il peut consulter deux juges du tribunal ou autres experts en

ne lui permette pas de servir comme juge dans l'éventualité d'un procès, implique que le rôle de l'enquêteur consiste seulement à collecter des indices et à les transmettre à l'Ordinaire. Ce dernier peut, s'il le désire, lui demander son opinion. Voir ASTIGUETA, « L'investigazione previa », 225-226.

¹⁰² Voir MILLETTE, « An Analysis of the Preliminary Investigation », 176-177.

¹⁰³ Voir MORRISEY, « The Preliminary Investigation », 193-194. Pour l'Église au Canada, la création du futur comité consultatif diocésain ou interdiocésain, des éparchies et des instituts jouera-t-il ce même rôle que la « Review Board » aux USA ? On sait déjà que ce comité aura comme mandat de donner des conseils sur la préparation et la mise à jour du protocole concernant les abus sexuels ainsi que sur son interprétation et sa bonne application. En collaboration avec le délégué et le délégué adjoint, ce comité consultatif proposera aussi une décision éclairée selon la probabilité des faits et la vraisemblance de l'allégation. Voir CONFÉRENCE DES ÉVÊQUES CATHOLIQUES DU CANADA, *Protection des personnes mineures*, 103-104.

droit (c. 1718, § 3)¹⁰⁴. S'il estime qu'il n'y a pas suffisamment d'indices, il peut demander une enquête supplémentaire. Concrètement, il rédige un décret où il affirme que l'enquête précédente est insuffisante il indique les aspects et les circonstances qui requièrent un supplément d'indices¹⁰⁵. Si par contre il estime que suffisamment d'indices ont été rassemblés, il émet un décret de clôture de l'enquête préliminaire.

Ce décret de clôture peut être uniquement un décret de clôture de l'enquête préliminaire sans autre indications sur la suite (un autre décret devant être pris plus tard), ou il peut en lui-même contenir les prochaines étapes : soit un « classement sans suite » aux archives secrètes de la curie (c. 1719) ou l'ouverture d'un procès pénal. En effet, après le décret de conclusion de l'enquête préliminaire, l'Ordinaire, pour déterminer l'étape convenable à suivre, doit se poser la question sur la possibilité, les avantages et la nécessité d'un procès pénal. Il se peut que le procès pénal ne soit pas possible parce que les indices en réalité exonèrent le sujet de l'enquête préliminaire ou alors montrent qu'il n'est pas imputable, ni punissable pour le délit allégué. Cette enquête peut aussi montrer que les faits allégués se sont déroulés en une date lointaine qui cause la prescription des faits ou en un lieu qui implique l'incompétence de juridiction de l'Ordinaire ; ou encore que l'allégation portée ait déjà fait l'objet d'un examen dans un autre procès. L'Ordinaire peut, avant sa décision, s'il le juge prudent, consulter deux juges ou d'autres experts en droit (c. 1718, § 3). Ces juges même si consultés, ne perdent pas leur habilité à être nommés lors du procès pénal futur.

6 — *Décisions possibles de l'Ordinaire*

L'Ordinaire, après l'enquête préliminaire, peut se rendre à l'évidence que la personne n'a pas commis un délit mais que ses actes demeurent reprochables. Il peut alors décider de lui faire une monition écrite pour prévenir la possibilité d'un futur délit (cc. 1339, § 1 ; 1348) ou même une réprimande pour faire arrêter une conduite habituelle qui bien que n'étant pas une offense en soi peut conduire à la commission d'un délit ou scandaliser les fidèles du Christ (c. 1339, § 2). Il gardera les traces de ces remèdes pénaux dans « les

¹⁰⁴ La commission de rédaction du Code estima que, parmi ces experts, ne doivent figurer ni le promoteur de justice, ni l'auditeur car ces derniers peuvent être consultés à tout moment. Voir COMMISSION PONTIFICALE POUR LA RÉVISION DU CODE DE DROIT CANONIQUE, « De iudicio criminali. Art. 1. De praevia investigatione », dans *Comm*, 12 (1980), 190.

¹⁰⁵ Voir PAPAË, *Formulario commentato*, 25-26.

archives secrètes de la curie » (c. 1339, §3). Ces écrits serviront de justificatifs à une censure future si jamais ces mesures venaient à être ignorées (c. 1347).

L'Ordinaire peut aussi, même si l'enquête préliminaire montre que la personne a probablement commis le délit, considérant le fait que le procès judiciaire formel est en droit canonique le dernier recours (c. 1341), chercher d'autres moyens (remèdes pénaux) afin de réparer le scandale, rétablir la justice, amender le coupable. S'il peut parvenir à la restauration de la justice par des moyens pastoraux sans avoir à imposer des peines médicinales ou expiatoires, alors il pourra éviter un procès pénal canonique. Il peut ainsi user des pénitences, des préceptes pénaux et autres actions administratives non pénales. Ces mesures pourraient résulter en des restrictions au niveau des facultés, des offices, ou à la demande qu'un ministère supervisé. Au cas où l'Ordinaire décide de ne pas promouvoir un procès pénal, il doit par décret justifier sa décision (allégation infondée, mort de la personne sous enquête préliminaire, délai de prescription)¹⁰⁶. Par contre, s'il estime qu'il faut pour restaurer la justice poursuivre avec un procès, il devra donc émettre un décret d'ouverture d'un procès pénal si le cas n'est pas réservé à la CDF.

6.1 — Le transfert des actes de l'enquête préliminaire à la CDF en cas de *delicta graviora*

Dans des cas d'allégation de délits les plus graves sur des personnes mineures de 18 ans, si l'accusation paraît vraisemblable et si le résultat de l'enquête préliminaire démontre la crédibilité de l'accusation, l'Ordinaire n'a plus la compétence ou le pouvoir de régler lui-même l'affaire¹⁰⁷. Il ne peut plus se fonder sur le c. 1718 pour faire prévaloir sa compétence, mais il doit après de décret de conclusion de cette enquête, transférer les allégations et les actes à la CDF¹⁰⁸ conformément à l'art. 16 de la SST qui dispose :

« Chaque fois que l'Ordinaire ou le Hiérarque vient à connaissance, au moins vraisemblable, d'un délit grave, une fois menée l'enquête

¹⁰⁶ Voir PAPAIE, *Formulario commentato*, 26-27.

¹⁰⁷ L'actuelle publication de la Conférence des évêques catholiques du Canada spécifie qu'une fois l'enquête préliminaire achevée par les autorités ecclésiastiques locales, si les allégations ont une certaine vraisemblance (« notitiam saltem verisimilem habeat »), la Congrégation pour la doctrine de la foi doit être informée, peu importe si les allégations d'abus sexuels à l'égard d'une personne mineure sont actuelles ou anciennes, et peu importe si la victime présumée n'est plus une personne mineure. Voir CONFÉRENCE DES ÉVÊQUES CATHOLIQUES DU CANADA, *Protection des personnes mineures*, 34.

¹⁰⁸ C.J. SCICLUNA, « Procédure et praxis de la Congrégation pour la doctrine de la foi en matière de *graviora delicta* », dans DUGAN (dir.), *La procédure pénale et la protection des droits*, 299 (= SCICLUNA, « Procédure et praxis de la Congrégation »).

préliminaire, il le signale à la Congrégation pour la Doctrine de la Foi, laquelle, si elle ne s'attribue pas la cause en raison de circonstances particulières, ordonne à l'Ordinaire ou au Hiérarque de procéder ultérieurement, restant cependant sauf, le cas échéant, le droit de faire appel contre la sentence de premier degré seulement auprès du Tribunal Suprême de cette même Congrégation. »

Dans le dossier des actes à envoyer à la CDF, l'Ordinaire doit entre-autres joindre le décret des mesures restrictives ou préventives, celui du retrait provisoire du ministère public « administrative leave », une synthèse de l'impact de l'allégation sur la communauté (scandale causé, dommage subit et son *votum* sur la suite à donner au cas dont-il est question en prenant en compte les quatre options possibles dont dispose la CDF¹⁰⁹. Selon l'art. 17 de la *SST*, art. 17. Si le cas est déféré directement à la Congrégation, sans que soit menée l'enquête préliminaire, les préliminaires du procès, qui reviennent d'après le droit commun à l'Ordinaire ou à l'Hiérarque, peuvent être accomplis par la CDF elle-même. Normalement, les allégations de délits graves dont le temps de prescription est échu ne devraient pas être transférés à la CDF si l'on veut respecter l'institution de la prescription criminelle. Mais l'art. 8 des *Normes essentielles* prévoit une exception pour les États-Unis d'Amérique et demande que les Ordinaires transfèrent tous les cas déjà prescrits de délits sexuels sur des personnes mineures à la CDF accompagnée d'une demande de « dérogation » à la prescription criminelle¹¹⁰.

Une fois le dossier reçu par la CDF, si elle n'exige pas d'informations supplémentaires, elle peut résoudre le cas par une des quatre options suivantes¹¹¹:

- Elle peut décider que les faits ne requièrent aucune intervention pénale ultérieure. Elle peut ainsi proposer ou confirmer certaines procédures administratives, non pénales susceptibles de promouvoir le bien commun de l'Église ainsi que celui du clerc accusé (Can. 1718, § 1, 1°, 2°). Il n'y a pas de recours contre de telles procédures administratives devant la Signature apostolique. Par contre, on peut en appeler aux cardinaux et évêques membres de la Congrégation ordinaire de la CDF, communément connue sous le nom de *Feria quarta* (Feria IV).

¹⁰⁹ Voir A. BAMBERG, « L'évêque face à la sainteté des sacrements. Loi et procédure concernant les délits les plus graves », dans *RDC*, 57 (2001), 426-427. Pour les éléments constitutifs du dossier à envoyer à la CDF en cas d'allégations d'abus sexuels sur des personnes mineures, voir SCICLUNA, « Procédure et praxis de la Congrégation », 296-302.

¹¹⁰ Voir MILLETTE, « An Analysis of the Preliminary Investigation », 181.

¹¹¹ SCICLUNA, « Procédure et praxis de la Congrégation », 299-302.

- Elle peut décider de présenter le cas directement au Souverain pontife pour un renvoi *ex officio* du clerc accusé ou pour la déposition avec dispense de la loi du célibat. Cette démarche est réservée pour les cas particulièrement graves où la culpabilité du clerc ne laisse aucun doute et est bien documentée. On doit certes au préalable, avoir accordé au coupable la possibilité de se défendre (Art. 21 § 2, 2°).
- Généralement, la CDF demande à l'Ordinaire qu'il sollicite du coupable de faire lui-même une pétition en vue d'une dispense des obligations sacerdotales. Dans le cas d'un refus du clerc, la section disciplinaire de CDF prépare un rapport pour le Saint-Père qui décide lui-même du cas. Le rescrit est ensuite communiqué à l'Ordinaire. Il ne peut y avoir recours ou appel contre la décision du Saint-Père.
- La CDF peut décider d'autoriser une procédure pénale administrative selon le c. 1720. En effet, l'art. 21 § 2 dispose :

Toutefois, la Congrégation pour la Doctrine de la Foi peut légitimement : 1° dans des cas particuliers, décider d'office ou sur instance de l'Ordinaire ou du Hiérarque de procéder par le décret extrajudiciaire dont il s'agit au c. 1720 du Code de droit canonique et au c. 1486 du Code des Canons des Églises orientales, en tenant compte, toutefois, que les peines expiatoires perpétuelles ne sont infligées que par mandat de la Congrégation pour la Doctrine de la Foi.

En d'autres termes, si l'Ordinaire est d'avis que le cas mérite l'imposition d'une peine de renvoi de l'état clérical, il doit porter son opinion à la connaissance de la Congrégation qui, en retour, décidera s'il faut infliger la peine ou non. Un recours contre la décision de la Congrégation peut être introduit auprès de la FERIA IV.

- La CDF peut décider d'autoriser l'Ordinaire à instruire un procès judiciaire pénal dans le diocèse. L'appel à ce procès est réservé au Tribunal de la CDF. Les juges, le promoteur de justice, les notaires et les avocats doivent être des prêtres (art. 14 SST). Les actes de la cause doivent être transmis *ex officio* à la CDF après la conclusion de la première instance (art. 16). Le promoteur de justice de la Congrégation a la faculté de faire appel de la sentence de première instance en un délai maximum de 30 jours; cette période commence à courir à partir du jour de la notification du jugement de première instance (« a die qua sententia primae instantiae ipsi Promotori nota data sit »). Dans ce cas, la CDF a la faculté d'accorder une *sanatio* des actes relatifs au droit de procédure en instances inférieures. La décision du Tribunal de la CDF en deuxième instance est sans appel et revêt l'autorité de la chose jugée (art. 28, 1°).

6.2 — Le décret d'ouverture du procès pénal

Le décret d'ouverture d'un procès pénal soit judiciaire soit extrajudiciaire marque véritablement le début de procès pénal. La personne qui était jusque-là sous enquête préliminaire est maintenant un accusé. Le procès pénal judiciaire donne une meilleure garantie de justice et d'équité par rapport à la protection des droits de la défense. Il offre une plus grande possibilité d'évaluation des éléments du délit, permet de se rendre compte de la contumace de l'accusé¹¹². Le procès pénal judiciaire est à privilégier (c. 1718, § 1, 3°) au procès extrajudiciaire administratif qui ne peut être décrété que pour de « justes raisons » (c. 1342). Le procès extrajudiciaire administratif (en dehors des cas de renvoi de l'état clérical prévus par la SST et les facultés spéciales qui permettent à la Congrégation pour le Clergé et à la Congrégation de l'évangélisation des peuples de traiter de manière nouvelle le renvoi du statut clérical), ne peut être employé par l'Ordinaire pour imposer des peines perpétuelles telle la privation d'office (c. 1336, § 1, 2°) ou le renvoi de l'état clérical¹¹³. Il faut tout de même souligner que la rapidité et la confidentialité du procès extrajudiciaire est un avantage pour la communauté et la bonne réputation de l'accusé¹¹⁴.

Dans le décret d'ouverture d'un procès judiciaire pénal (c. 1718, § 1, n° 1-3), il sied de mentionner la date d'arrivée de l'allégation, celle du lieu où le délit se serait réalisé, le décret d'ouverture de l'enquête préliminaire qui met en relief des éléments conduisant au *fumus delicti*. Le décret doit aussi mentionner le fait que les différents recours aux moyens de sollicitude pastorale du c. 1341 se sont démontrés insuffisants¹¹⁵ ; et qu'aucune « juste cause » ne fait obstacle à la tenue d'un procès judiciaire (c. 1342, § 1) ; et que les deux juges ou autres experts en droit ont été consultés (c. 1718,

¹¹² En effet, dans une procédure administrative, le *dominus*, mieux celui qui guide l'entière procédure du début à la fin est l'Ordinaire, tandis que, dans un procès judiciaire, l'action criminelle provient du promoteur de justice. Cette différence structurelle peut avoir une conséquence sur l'impartialité de l'organe judiciaire. Voir PAPAIE, *Formulario commentato*, 30. Voir aussi J. SANCHIS, « L'idagine previa al processo penale (cann. 1717-1719) », dans ARCISODALIZIO DELLA CURIA ROMANA (dir.), *I procedimenti speciali nel diritto canonico*, Cité du Vatican, LEV, 1992, 261-262.

¹¹³ Voir GREEN, « The Preliminary Investigation », 1809. Voir aussi J.A. RENKEN, « The 2009 Special Faculties Conceded by Pope Benedict XVI to Address Serious Clergy Issues: A Brief Commentary », dans *SCL*, 5 (2009), 277-296.

¹¹⁴ Voir ASTIGUETA, « L'investigazione previa », 231.

¹¹⁵ Voir CIC/83, c. 1341: « L'Ordinaire aura soin de n'entamer aucune procédure judiciaire ou administrative en vue d'infliger ou de déclarer une peine que s'il est assuré que la correction fraternelle, la réprimande ou les autres moyens de sa sollicitude pastorale ne peuvent suffisamment réparer le scandale, rétablir la justice, amender le coupable ».

§ 3) et vu le c. 1718, § 1, n°3. Également, le décret d'un procès pénal administratif doit indiquer *mutatis mutandis*, la « juste cause » qui nécessite un procès pénal administratif et empêche la tenue d'un procès judiciaire pénal.

Conclusion

L'objectif de cet article a été double : d'abord saisir la nature et le déroulement de l'enquête préliminaire encadrés par les cc. 1717 à 1719 de l'actuel Code de droit canonique ; ensuite s'interroger sur l'existence d'éventuels droits de la défense durant cette phase. Nous avons entre autres, montré que selon le CIC/83, l'enquêteur a pour tâche de vérifier si un délit a probablement été commis et dans quelles circonstances, si le sujet visé par des allégations serait réellement l'auteur du présumé délit, si ledit délit lui est vraisemblablement imputable et dans quelle mesure, et au vu des éléments rassemblés, s'il est opportun d'entamer une poursuite pénale contre lui. Si on peut facilement s'apercevoir que le législateur n'indique pas véritablement comment mener l'enquête préliminaire, on ne peut ne pas remarquer qu'à l'exception de l'attention requise pour ne pas compromettre la bonne réputation du c. 1717, § 2, le Code ne mentionne pas de manière explicite les droits de défense de la personne lors du déroulement de l'enquête préliminaire.

En effet, comme nous l'avons indiqué ci-dessus, le législateur pénal canonique n'affirme pas que le suspect doit être mis au courant d'une éventuelle dénonciation ou de l'ouverture d'une enquête préliminaire ; il ne précise pas si la personne sous enquête préliminaire doit être informée de l'identité de l'auteur de l'allégation, ou s'il a droit à un conseil juridique pendant cette phase. Mais encore, il ne fait pas obligation formelle à l'enquêteur d'interroger l'auteur du délit présumé. Les droits garantis arrivent seulement plus tard comme celui de réclamer les dommages causés par des actes illégitimes (c. 128) ou lorsque la bonne réputation a été compromise parce qu'on n'a pas procédé avec diligence (c. 1717, § 2; 220)¹¹⁶. Ces lacunes sont sérieuses et même graves puisque nous sommes en matière pénale où prévaut l'interprétation stricte de la loi et où il faut éviter de faire ou d'affirmer ce qui n'est pas contenu dans la loi.

Il s'en suit que ce silence ou cette imprécision du législateur pénal canonique a une répercussion sur les droits de la défense pendant l'enquête préliminaire. L'exercice des droits de défense du clerc, de la religieuse ou du

¹¹⁶ Voir GULIO, « Les raisons de la protection judiciaire », 158.

religieux suspecté d'un quelconque délit canonique (cc. 1364-1399) s'en trouve pratiquement difficile. Cette défense est d'autant plus difficile lorsqu'il s'agit des allégations d'abus sexuels sur des personnes mineures. Dans ces cas la présomption d'innocence semble devenir actuellement un leurre et la présomption de culpabilité une réalité contre laquelle la personne qui n'est même pas encore accusée. Celle-ci devra laborieusement batailler pour s'en départir tout au long de l'enquête préliminaire.

S'agissant du cas spécifique des délits d'abus sexuels, il faut reconnaître le rôle important qu'ont joué les médias. Ceux-ci ont rendu publique l'histoire des personnes abusées rompant ainsi avec une logique de silence autour de ce drame humain et social¹¹⁷. Toutefois, il convient aussi d'affirmer qu'une médiatisation excessive et souvent partielle de certains procès donne une image combative et insécurisante des enquêtes. Le risque immédiat est que l'enquête préliminaire puisse être grandement influencée par une sorte de « justice des media » ou de « justice populaire ». Sans doute de nos jours, les mass médias et les réseaux sociaux sont d'une aide précieuse dans la dénonciation des crimes et des criminels. Cependant, une fois rendu au niveau de ceux qui doivent « dire le droit », il convient de laisser la justice agir dans le respect des droits de toutes les parties. Ceci est d'autant plus important pour ce qui est du droit canonique pénal qui a cette particularité d'être pastoral et « surtout se doit d'être exemplaire, pédagogique en quelque sorte »¹¹⁸. Cette capacité à tenir en équilibre le respect des droits de la victime, de l'auteur du délit et de la communauté est aujourd'hui plus que nécessaire si l'Église veut encore se considérer comme *speculum iustitiae* pour les ordonnancements étatiques¹¹⁹.

C'est dire *in fine* que « le procès pénal en particulier et l'enquête préalable, est à redécouvrir comme un lieu privilégié d'écoute de nature à favoriser la vérité, à éviter les mouvements irraisonnés au sein des communautés locales et dans l'opinion publique, et à assurer la sécurité » du plaignant comme celle de l'auteur présumé du délit « par la prise des mesures de prévention et de protection »¹²⁰. Un moyen de le faire reviendrait à ce que le législateur canonique, adjoigne aux cc. 1717 à 1719, des canons qui explicitement octroient des droits à la défense dès la phase de l'enquête préliminaire. La prise de conscience contemporaine de la nécessité de respecter les

¹¹⁷ Voir J-G. NADEAU, « La réaction de l'Église au dévoilement des abus sexuels par des prêtres : une difficile conversion », dans *Prêtre et Pasteur, revue des agents de pastorale*, 118 (2018), 451.

¹¹⁸ J.-L. HIEBEL, « Pastorale et droit canonique pénal », dans *RDC*, 56 (2006), 182.

¹¹⁹ Voir LLOBELL, « L'équilibre entre les intérêts », 147.

¹²⁰ ALGIER-GIRAULT, « Le procès pénal canonique », 420.

droits de tout justiciable aussi bien devant les tribunaux étatiques que de ceux ecclésiastiques, requiert qu'à toute étape de la procédure judiciaire, fût-elle préliminaire, une fois qu'un droit ou une liberté est susceptible d'être restreint, que le sujet en soit averti et que la possibilité lui soit donnée de s'expliquer et de se défendre. Pour cela il faut *mutatis mutandis*, une transparence dans la procédure. Une transparence qui doit commencer dès l'ouverture de l'enquête préliminaire et se poursuivre au cours du procès pénal.

THE CANONICAL RIGHTS OF THOSE ACCUSED OF THE DELICT OF SEXUAL ABUSE¹

JOHN ANTHONY RENKEN

SUMMARY — The Church recognizes and identifies the rights of victims/survivors of sexual abuse. It also recognizes the rights of those who are accused of committing these wrongful acts. The rights of victims/survivors and the rights of offenders are not mutually exclusive: on the contrary, these rights coexist simultaneously. This study focuses on the identification in the Catholic Church of rights belonging to a person accused of sexual abuse of minors and vulnerable persons. When these rights are respected, protected, and exercised, it is expected that the truth of this allegation will be revealed.

RÉSUMÉ — L'Église reconnaît et identifie les droits des victimes / survivantes d'abus sexuel. Il reconnaît également les droits de ceux qui sont accusés d'avoir commis ces actes fautifs. Les droits des victimes / survivants et les droits des délinquants ne s'excluent pas mutuellement: au contraire, ces droits coexistent simultanément. Cette étude se concentre sur l'identification dans l'Église catholique des droits fondamentaux appartenant à une personne accusée d'abus sexuel sur des mineurs et des personnes vulnérables. Lorsque ces droits sont respectés, protégés et exercés, il est prévu que la vérité de cette allégation sera révélée.

Introduction

To address the rights of those accused of sexual abuse of minors and vulnerable persons is an unpopular topic, both in the Church and in secular society. Yet, both the Church and society would be woefully barbarian and

¹ This study expands upon a briefer treatment of the rights of those accused of sexual abuse entitled "Les droits canoniques de ceux qui sont accusés du délit de l'abus sexuel dans l'Église," published in S. JOULAIN, K. DEMASURE, and J.-G. NADEAU (dirs.), *L'Église déchirée: Comprendre et traverser la crise des agressions sexuelles sur mineurs*, Paris, Bayard, 2020.

chaotic, governed and directed by the vacillating and subjective whims of various leaders, if persons have no rights when accused of criminal behavior. This study intends to identify the rights within the Church, sanctioned by and/or expressed in its legal procedures, which are possessed by those accused of the ecclesiastical delict of sexual abuse of minors and vulnerable persons. It in no way wishes to provide technicalities whereby the guilty must be found innocent, much less to underestimate the serious damage that this criminal behavior causes in communities and most especially in victims/survivors. Rather, it intends to present, in an objective fashion, reflections on the rights belonging to those accused of this serious crime. Many of these rights of the accused are “substantive rights” – that is, they are rooted in the fundamental societal or ecclesial order. They reflect and protect the dignity of the human person. Others are “procedural rights” – that is, rights held by the accused during a canonical penal process within which an alleged delict is addressed – a process the purpose of which is *to discover the truth* – in order to repair scandal, to restore justice, to reform the offender (c. 1341), that is, to advance *healing* to the Church, the victims/survivors, and the perpetrators.²

1 — *Reflections on Fundamental Rights in the Church*

The 1983 Code of Canon Law contains a succinct list of rights and obligations which belong to all the Christian faithful, in addition to other rights and obligations dispersed throughout the Code.³ Such a succinct list of

² Canon 1400 § 1 identifies two purposes of an ecclesiastical judgment. “The object of a trial is: 1° the pursuit or vindication of the rights of physical or juridic persons, or the declaration of juridic facts; 2° the imposition or declaration of a penalty for delicts.”

³ A recognition of the rights and obligations of persons in the Church reflects a development of such recognition in secular society and a gradual development of the same in the Church. Tracing both this secular and ecclesial development is beyond the scope of this study, but one may wish to refer to other sources identifying this development: e.g., Richard BARRETT, “Two Recent Decisions from the Signatura Affecting the Right to Privacy,” in *CLSGBI Newsletter* (2000), 6-20; Rosalio José CASTILLO LARA, “Some Reflections on the Rights and Duties of the Christian Faithful,” in *StC*, 20 (1986), 9-14; IDEM, “I doveri e in diritti dei cristifideles,” in *Salesianum*, 48 (1986), 307-329; James A. CORIDEN, “A Challenge: Make the Rights Real,” in *Jur*, 45 (1985), 1-23; Victor G. D’SOUZA, “The Right to Privacy of Candidates to Priesthood and Religious Life,” in *STL*, 2 (2006), 147-172; Giorgio FELICIANI, “I diritti e doveri nella codificazione postconciliare,” in *QDE*, 3 (1995), 252-272; Giorgio FELICIANI, “Obblighi e diritti di tutti i fedele cristiani,” in A. LONGHITANO et al., *Il fedele cristiano*, Bologna, Edizioni Dehoniane, 1989, 66-68; Roland JACQUES, “Les droits et devoirs des fidèles: aperçus historiques,” in *StC*, 38 (2004), 439-460; IDEM, “Historical

specific rights and obligations did not exist in the 1917 Code.⁴ Certain rights and obligations pertain to all the faithful (cc. 208-223);⁵ others pertain precisely to the laity (cc. 224-231), to the clergy (cc. 273-231), and to religious (cc. 662-672).

The sixth principle guiding the revision of the Code of Canon Law, developed by the Synod of Bishops in 1967, called for recognition of fundamental human rights in the Church. "The rights of each and every member of the Christian faithful must be acknowledged and protected, both those contained in the natural law and the divine positive law, and those which are duly derived from them because of the innate social condition which the Christian faithful acquire and possess in the Church."⁶ Speaking of the rights of all the Christian faithful contained in the Code of Canon Law, Pope John Paul II said to the members of the Roman Rota on 26 February 1983: "The Church has always affirmed and promoted the rights of the faithful, and in the new Code, indeed, she has promulgated them as a *fundamental charter*

View of the Rights/Obligations of the Faithful in the Church," in CCLS, 39th Annual Convention, Charlottetown, PEI, 18-21 October 2004, 17-32; John KINNEY, *The Juridic Condition of the People of God: Their Fundamental Rights and Obligations in the Church*, Rome, Officium Libri Catholici, 1972; Dominique LE TOURNEAU, "Quelle protection pour les droits et les devoirs fondamentaux des fidèles dans l'Église?" in *StC*, 28 (1994), 59-83; John P. MCINTYRE, "Rights and Duties Revisited," in *Jur*, 56 (1996), 111-127; Augustine MENDONÇA, "Promotion and Protection of Rights in the Church," in *PCF*, 2 (2000), 31-59; Michael R. MOODIE, "Defense of Rights: Developing New Procedural Norms," in *Jur*, 47 (1987), 423-448; Francis G. MORRISEY, "The Rights and Duties of the Faithful according to the Code of Canon Law," in *SCL*, 1 (2005), 27-33; Ladislaus ÖRSY, "Fundamental Rights in the Church: Personal Report on the Convention of the International Association for the Study of Canon Law," in *Jur*, 41 (1981), 177-187; Michele RIONDINO, "Function and Application of the Penalty in the Code of Canon Law," in *Jus*, 4/2 (2020), 143-183; Rik TORFS, "Rights in Canon Law: Real, Ideal, or Fluff?," in *CLSAP*, 61 (1999), 343-384.

⁴ *CIC/1917* canon 87 acknowledged the existence of ecclesial right and duties stemming from baptism: "By baptism one is constituted as a person in the Church of Christ with all the rights and duties of Christians..." Nonetheless, the 1917 Code did not contain a succinct listing of specific rights and obligations of persons in the Church.

⁵ During the process of forming the 1983 Code, a list of fundamental rights of the Christian faithful was contained in the *Lex fundamentalis Ecclesiae* and the *Schema De populo Dei*. When the decision was made in 1981 not to promulgate a separate *lex fundamentalis*, most of its canons were reinserted into what became the 1983 Code. José Rosalío CASTILLO LARA explains that Pope John Paul II was motivated not to promulgate a *lex fundamentalis* among other reasons by ecumenical considerations. Perhaps there was also the fact that on some points a sufficient favorable consensus did not exist for a document of such novelty and importance, for instance, on the issue of fundamental rights and in general on the concept itself of a *lex fundamentalis*: "Some Reflections on the Rights and Duties of the Christian Faithful," 14.

⁶ *Comm*, 1 (1969), 82-83 [author's translation].

(cf. cc. 208-223). She thus offers opportune juridical guarantees for protecting and safeguarding adequately the desired reciprocity between the rights and duties inscribed in the dignity of the person of the *Christian faithful* [*christifidelis*].⁷ The Roman Pontiff not only acknowledges the rights of the faithful as belonging to a fundamental charter for the Church, but also calls for juridical guarantees to protect these rights. In this allocution, *inter alia*, he makes reference to canon 221, on the fundamental right to due process in the Church:

Canon 221 – § 1. The Christian faithful can legitimately indicate and defend the rights which they possess in the Church in the competent ecclesiastical forum according to the norm of law.

§ 2. If they are summoned to a trial by a competent authority, the Christian faithful also have the right to be judged according to the prescripts of the law applied with equity.

§ 3. The Christian faithful have the right not to be punished with canonical penalties except according to the norm of law.⁸

This canon reflects a fundamental human right.⁹ It guarantees all the faithful the right to the due process of law. The penal procedure gives the accused the right of self-defense (see cc. 1598 § 1, 1620, 7°).¹⁰

Commenting on the common and fundamental rights of all the Christian faithful identified in the Code, Javier Hervada reflects:

This title contains a declaration – with the force of law – of rights and obligations that are fundamental to the faithful. It is similar in structure to the declarations of human rights promulgated by the United Nations and various

⁷ JOHN PAUL II, Allocution to the Roman Rota, 26 February 1983, in AAS, 75 (1983), 544-559; English translation in William H. WOESTMAN (ed.), *Papal Allocutions to the Roman Rota, 1939-2002*, Ottawa, St. Paul University, 2002, 176-180 (n. 2). See also IDEM, Allocution to the 9th Course for Ecclesiastical Judges on the Renewal of the Code at the Pontifical Gregorian University, Rome, 5 December 1981, in AAS, 74 (1982), 225-227.

⁸ One will recall that canon 87 § 1 says that the diocesan bishop cannot dispense from procedural or penal laws.

⁹ See José Rosalio CASTILLO LARA, "Some Reflections on the Rights and Duties of the Christian Faithful," 20; Raffaele COPPOLA, "La tutela dei diritti nel processo penale canonico," in *ME*, 113 (1988), 73-84.

Francis G. MORRISSEY lists several procedural rights which are founded in the natural order: (1) the right to know the accusation brought; (2) the right to know the accusers; (3) the right to be presumed innocent until the contrary is proven; (4) the right to present one's side of the matter; (5) the right to present witnesses; (6) the right to a fair trial, based on principles of natural justice; (7) the right to a speedy trial; (8) the right to a just sentence, based on the law; and (9) the right to appeal against a decision: "The Rights and Duties of the Faithful According to the Code of Canon Law," in *SCL*, 1 (2005), 47-48.

¹⁰ Péter SZABÓ, "The Penal Legality and Guarantees of Self-Defense in Canon Law: CIC/CCEO," in *FC*, 4 (2016), Suppl., 191-198.

secular constitutions, the style of which has clearly influenced the following canons. Strictly speaking, only those fundamental rights that derive from baptism – the only ones that can be described as fundamental rights of the faithful – should be included under this title, not natural rights, nor rights with a positive origin. This technico-juridical strictness is not always maintained, however, nor is it always present in declarations of human rights. Many, but not all, of the rights and obligations listed are rights and obligations stemming from divine law.

As the canons of this title pertain to constitutional law, they rank more highly than other non-constitutional canons, i.e., legislation must be interpreted in conformity with them, and judges must solve cases in such a way that these rights are recognized and guaranteed.¹¹

To summarize, everyone in the Church possesses fundamental rights which are not lost or compromised even when one commits sinful or criminal actions. These rights, substantive and procedural, are rooted in the natural order and in the ecclesial order.

2 — The Fundamental Right to be Judged according to the Law at the Moment of the Offense

The accused has the right to be judged in accord with the substantive penal law operative at the time of the presumed delict. It is very important to identify the definition or scope of the delict at the time that the alleged infraction had been committed, because later changes in the scope of the offense are not “retroactive” unless the revised penalty is more favorable to the offender (c. 1313, see also c. 9). The accused has the right to be tried in accord with the penal law in force at the time of the alleged offense.

In recent years, the “definition” or “scope” of the offense of sexual abuse of minors and vulnerable persons in the Church has developed considerably, beginning with the 1983 Code of Canon Law and culminating in two legislative acts of Pope Francis:¹² his 2019 apostolic letter *Vos estis lux mundi*

¹¹ Javier HERVADA, Commentary on Book II, The People of God, Part I, Christ’s Faithful, Title I: The Obligations and Rights of all Christ’s Faithful, in *CCLA2*, 169-170. See also Walter KASPER, “The Theological Foundations of Human Rights,” in *Jur*, 50 (1990), 148-166.

¹² These two papal documents follow the “Vatican Summit” which Pope Francis convoked on 21-24 February 2019 at the Vatican. See John A. RENKEN, “Safeguarding God’s People as a Synodal Church: Reflections after the Vatican Summit on the Protection of Minors, 21-24 February 2019,” in *SCL*, 14 (2019), 37-87; Mark COLERIDGE, “Meeting on the Protection of Minors in the Church: Reflections,” in *CLSANZP*, 53 (2019), 50-57.

(VE)¹³ and his modification of the *Normae de gravioribus delictis* issued by the Congregation for the Doctrine of the Faith, also in 2019.¹⁴ The current legislation provides that the following acts against the sixth commandment of the Decalogue are delicts when perpetrated by clerics and members of institutes of consecrated life and societies of apostolic life:

- forcing someone to perform or submit to sexual acts, whether by violence,
- threat or abuse of authority
- performing sexual acts with a minor or a vulnerable person
- the production, exhibition, possession or distribution, including by electronic means, of child pornography, as well as the recruitment or inducement of a minor or a vulnerable person to participate in pornographic exhibitions (VE art. 1 § 1, a).

“Child pornography” is “any representation of a minor, regardless of the means used, involved in explicit sexual activities, whether real or simulated, and any representation of sexual organs of minors for primarily sexual purposes” (VE art. 1 § 2, c). A “minor” is “any person under the age of eighteen, or who is considered by law to be the equivalent of a minor” (VE art. 1 § 2, a, b). A “vulnerable person” is “any person in a state of infirmity,

¹³ POPE FRANCIS, apostolic letter m.p. *Vos estis lux mundi*, 7 May 2019, at www.vatican.va. For commentaries on *Vos estis*, see Damián ASTIGUETA, “Lettura di *Vos estis lux mundi*,” in *Per*, 108 (2019), 517-550; Rodger AUSTIN et al., “*Vos estis lux mundi* – An Open Forum,” in *CLSANZP*, 53 (2019), 68-84; Brendan DALY, “*Vos estis lux mundi*: New Procedures for Dealing with Complaints of Abuse,” in *The Canonist*, 10 (2019), 114-163; Pius Barinaadaa KII, *Dealing with Clerical Sexual Abuse of Minors: New Norms*, Enugu, Nigeria, Fourth Dimension Publishing Co., 2019; John A. RENKEN, “*Vos estis lux mundi*: The Evolution of the Church’s Response to Sexual Abuse and Its Cover-Up after the Vatican Summit,” in *StC*, 53 (2019), 627-658; José Luis SÁNCHEZ-GIRÓN, “El ‘motu proprio’ ‘*Vos estis lux mundi*’: Contenidos y relación con otras normas del derecho canónico vigente,” in *Estudios eclesiológicos*, 94 (2019), 686-687, 698-699.

¹⁴ SECRETARIAT OF STATE AND CONGREGATION FOR THE DOCTRINE OF THE FAITH, Rescript *ex audientia Smm.* modifying *Normae de gravioribus delictis*, 3 December 2019, at www.vatican.va [= SECRETARY OF STATE, Rescript *ex audientia Smm.*, 3 December 2019]. The Congregation for the Doctrine of the Faith issued these *Normae* in 2010: CDF, Rescript *ex audientia Smm.*, 21 May 2010, in *AAS*, 102 (2010), 419-430. These *Normae* are a revision of those issued by the CDF on 18 May 2001. See CDF, epistula a Congregatione pro Doctrina Fidei ad totius Catholicae Ecclesiae Episcopos aliosque Ordinarios et Hierarchas interesse habentes: *De delictis gravioribus eidem Congregationi pro Doctrina Fidei reservatis*, 18 May 2001, in *AAS*, 93 (2001), 785-788. Pope John Paul II had mandated the CDF to provide substantive and procedural norms concerning the *graviora delicta* reserved to the CDF with his apostolic letter m.p. *Sacramentorum sanctitatis tutela*, 30 April 2001, in *AAS*, 93 (2001), 737-739.

physical or mental deficiency, or deprivation of personal liberty which, in fact, even occasionally, limits their ability to understand or to want or otherwise resist the offence” (VE art. 1 §2, a, b); this category includes anyone forced to perform or submit to sexual acts by violence, threat, or abuse of authority (VE art. 1 §1, a, i).

The investigation and judgment concerning the following acts of sexual abuse of a minor committed by a cleric is reserved to the Congregation for the Doctrine of the Faith:

Article 6 – §1. The more grave delicts against morals which are reserved to the Congregation for the Doctrine of the Faith are:

1° the delict against the sixth commandment of the Decalogue committed by a cleric with a minor below the age of eighteen years; in this number, a person who habitually has the imperfect use of reason is to be considered equivalent to a minor;

2° the acquisition, possession, or distribution by a cleric of pornographic images of minors under the age of fourteen, for purposes of sexual gratification, by whatever means or using whatever technology;

§2. A cleric who commits the delicts mentioned above in §1 is to be punished according to the gravity of his crime, not excluding dismissal or deposition.¹⁵

On 3 December 2019, Pope Francis reserved to the Congregation for the Doctrine of the Faith the delict of pornography involving images of minors under the age of eighteen years (that is, images of *all* minors, not only those under the age of fourteen years); this law became effective 1 January 2020.¹⁶ No other delicts of sexual abuse are reserved to the Congregation for the Doctrine of the Faith.

At the present time, the universal law provides that the delict of sexual abuse of minors and vulnerable persons is only committed by clerics and members of institutes of consecrated life and societies of apostolic life. The universal law does not establish a delict of sexual abuse committed by laypersons. Nonetheless, the sexual abuse of minors and vulnerable persons perpetrated by laypersons can be established as a delict by particular law (see cc. 1315-1316). It is certainly reasonable to encourage the creation of such particular penal law.¹⁷

¹⁵ CDF, 2010 *Normae de gravioribus delictis*, art. 4.

¹⁶ SECRETARY OF STATE, Rescript *ex audientia Ssmm.*, 3 December 2019, art. 1.

¹⁷ Presumably, the particular penal law would threaten an expiatory penalty (see c. 1336). Canon 1312 §2, which allows the legislator to create expiatory penalties other than those established in the law, states: “The law can establish other expiatory penalties which deprive a member of the Christian faithful of some spiritual or temporal good and which are consistent with the supernatural purpose of the Church.”

3 — *The Right to the Presumption of Innocence*

The accused has the fundamental right to the presumption of innocence.¹⁸ The accused does not have the obligation to prove that the alleged offense did not take place, although such proactive self-defense would be beneficial (particularly if it demonstrates that it is impossible for the accused to have committed the alleged offense). Indeed, until the occurrence of the alleged offense is certain, natural justice requires that the accused be considered innocent. The allegation itself cannot be equated with a presumption of guilt.¹⁹

The accused is presumed innocent until his or her culpability is established, even if imputability is presumed when a person externally violates a penal law or precept by reason of malice or negligence:

Canon 1321 – § 1. No one is punished unless the external violation of a law or precept, committed by a person, is gravely imputable by reason of malice [*dolus*] or negligence [*culpa*].

§ 2. A penalty established by a law or precept binds the person who has deliberately violated the law or precept; however, a person who violated a law or precept by omitting necessary diligence is not punished unless the law or precept provides otherwise.

§ 3. When an external violation has occurred, imputability is presumed unless it is otherwise apparent.

This canon explains that the simple external violation of a law does not either prove juridical imputability or justify a penalty. On the contrary, one can only be punished if one has committed the external violation of a penal law or precept which is seriously imputable by reason of *dolus* or *culpa*. With external violation of a penal law/precept, imputability is presumed

¹⁸ See Randolph BROWN, *The Presumption of Innocence: An Historical Investigation Concerning the Existence of the Presumption in Favor of the Accused in the Criminal Law of the Church*, JCD dissertation, Rome, Pontifical Gregorian University, 1962; Francisco José CAMPOS MARTÍNEZ, “Presunción de inocencia e investigación previa canónica. Pautas para un procedimiento justo en denuncias por abuso sexual,” in *Per*, 108 (2019), 471-516; Kenneth PENNINGTON, “Innocent Until Proven Guilty: The Origins of a Legal Maxim,” in Patricia M. DUGAN (ed.), *The Penal Process and the Protection of Rights in Canon Law: Proceedings of a Conference Held at the Pontifical University of the Holy Cross, Rome, March 25-26, 2004*, Montreal, Wilson and Lafleur Ltée, 2005, 45-66 [= DUGAN (ed.), *The Penal Process*].

¹⁹ Thomas P. DOYLE observes: “The presumption of guilt and moral turpitude should not be made as soon as the allegation is lodged:” “The Canonical Rights of Priests Accused of Sexual Abuse,” in *SlC*, 24 (1990), 340.

“unless it is otherwise apparent.” This presumed imputability does not substitute for a penal process.

The burden of proof rests with the person making the allegation (c. 1526 § 1); in a juridical penal process, the burden rests with the promoter of justice (see c. 1721 § 1), who “is bound by office to provide for the public good” (c. 1430).²⁰ The task of determining the imputability of the accused rests with the judge (in the judicial process) or ordinary (in the extrajudicial process). Until imputability is proved with moral certainty, the accused is presumed innocent of the delict.

The presumption of the innocence of an accused person is fundamental to a sane and just penal system. Indeed, the *Compendium of the Social Doctrine of the Church* explains: 404. ... “*Officials of the court are especially called to exercise due discretion in their investigations so as not to violate the rights of the accused to confidentiality and in order not to undermine the principle of the presumption of innocence. Since even judges can make mistakes, it is proper that the law provide for suitable compensation for victims of judicial errors.*”²¹ The presumption of innocence of a person accused of the delict of sexual abuse is assured by the Congregation for the Doctrine of the Faith in its Circular Letter to Assist Episcopal Conferences in Developing Guidelines for Dealing with Cases of Sexual Abuse of Minors Perpetrated by Clerics (2 May 2011),²² and by Pope Francis, the apostolic letter *Vos estis lux mundi* (7 May 2019).²³

²⁰ The promoter must prove that there was an “external violation of a law or precept [which is] gravely imputable by reason of malice or negligence” to the accused (c. 1321 § 1). See Victoria VONDENBERGER, “Promoting Justice: Reflections as Promoter of Justice for the Archdiocese of Cincinnati, Ohio,” in Patricia M. DUGAN (ed.), *Advocacy Vademecum*, Montréal, Wilson & Lefleur Ltée, 2006, 117-121 [= DUGAN (ed.), *Advocacy Vademecum*].

²¹ PONTIFICAL COUNCIL FOR JUSTICE AND PEACE, *Compendium of the Social Doctrine of the Church*, 29 June 2004, no. 404, Vatican City, Libreria Editrice Vaticana, 2004.

²² “The accused cleric is presumed innocent until the contrary is proven. Nonetheless the bishop is always able to limit the exercise of the cleric’s ministry until the accusations are clarified. If the case so warrants, whatever measures can be taken to rehabilitate the good name of a cleric wrongly accused should be done.” CONGREGATION FOR THE DOCTRINE OF THE FAITH, “Circular Letter to Assist Episcopal Conferences in Developing Guidelines for Dealing with Cases of Sexual Abuse of Minors Perpetrated by Clerics,” 2 May 2011, art. I, d 3, at www.vatican.va. See Thomas J. GREEN, “CDF Circular Letter on Episcopal Conference Guidelines for cases of Clerical Sexual Abuse of Minors: Some Initial Observations,” in *Jur*, 73 (2013), 174; John Paul KIMES, “*Simul et cura et solertia*. Guidelines of the Episcopal Conferences for Dealing with Cases of Sexual Abuses of Minors Perpetrated by Clerics,” in Claudio PAPAIE (ed.), *I delitti riservati alla Congregazione per la dottrina della fede. Norme, prassi, obiezioni*, Quaderni di ius missionale 5, Rome, Urbaniana University Press, 2017, 45-74.

²³ *Vos estis*, art. 12 § 7. “The person under investigation enjoys the presumption of innocence.”

4 — *Rights to a Good Reputation and to Privacy*

The accused has the right to a good reputation, which the Code guarantees to all the Christian faithful in canon 220:²⁴ “No one is permitted to harm illegitimately the good reputation which a person possesses or to injure the right of any person to protect his or her own privacy.” This represents a fundamental human right,²⁵ which is repeated in codified ecclesiastical law.²⁶

²⁴ For detailed history of the development of canon 220, see Alfonso CAUTERUCCIO, “Il diritto alla buona fama ed alla intimità: Analisi e commento del canone 220,” in *Commentarium pro religiosis et missionariis*, 73 (1992), 39-81; Diane L. BARR, *The Right to One's Reputation: Applicable Legislation in the United States of America* (JCD thesis), Ottawa, Saint Paul University, 1993; Francesco BUONO, *La tutela penale della dignità della persona umana nel Codice di diritto canonico del 1983* (JCD thesis), Rome, Pontificia Università Lateranense, 2011.

For further reflections on the right to a good reputation and to privacy (and the obligation of an ordinary to protect these rights during the penal preliminary obligation), see Damian G. ASTIGUETA, “Trasparenza e segreto. Aspetti della prassi penalistica,” in *Per*, 107 (2018), 523-535; Michael BRADLEY, “The Evolution of the Right to Privacy in the 1983 Code of Canon Law,” in Patrick COGAN (ed.), *Sacerdotis iuris: Miscellanea in Honour of William H. Woestman, O.M.I.*, Ottawa, Saint Paul University, 2005, 187-234; Davide CITTO, “Trasparenza e segreto nel diritto penale canonico,” in *Per*, 107 (2018), 513-522; PONTIFICAL COUNCIL FOR LEGISLATIVE TEXTS, *Elementi per configurare l'ambito di responsabilità canonica del Vescovo diocesano nei riguardi dei presbyteri incardinati nella propria diocesi e che esercitano nella medesima il loro ministero*, 12 February 2004, in *Comm*, 36 (2004), 33-38; Dominique LETOURNEAU, “Le canon 220 et les droits fondamentaux à la bonne réputation et à l'intimité,” in *IE*, 26 (2014), 127-148; Pedro LÓPEZ-GALLO, “Case of Rights and Defamation,” in *Jur*, 49 (1989), 286-302; Stuart MACDONALD, “The Use of Psychological Testing in Light of *graviora delicta* Cases,” in DUGAN (ed.), *Advocacy Vademecum*, 21-31; R. Vittorio MARCOZZI, “Indagini psicologiche e diritti della persona,” in *La civiltà cattolica*, 127/2 (1976), 541-551; IDEM, “Il diritto alla propria intimità nel nuovo Codice di diritto canonico,” in *La civiltà cattolica*, 134/4 (1983), 573-580; IDEM, “Le droit a l'intimité propre' dans le nouveau Code de droit canonique,” in *Vie consacrée*, 57 (1985), 370-379; Lucien MILLETTE, “An Analysis of the Preliminary Investigation in Light of the Rights of the Accused,” in *Jur*, 75 (2015), 109-195; Ladislaus ÖRSY, “Priests' Privacy and Reputation Need Protection,” in *Homiletic and Pastoral Review*, 10 (2003), 54-57; Alessandro PEREGO, *La buona fama nella vita ecclesiale e la sua protezione nell'ordinamento canonico*, Bari, Ecumenica Editrice, 2003; John A. RENKEN, “Canons 1717-1731: Rights of a Priest Accused of Misconduct with an Adult,” in *RR 2008*, 134-138; Piotr SKONIECZNY, “La tutela della buona fama del chierico accusato degli abusi sessuali su minori: un modo di procedere nel caso concreto in base al can. 220 CIC/83,” in *Angelicum*, 87 (2010), 923-941.

²⁵ Francis G. MORRISEY reflects, “Probably the most important canon in regard to rights in the Church is c. 220 on the right to reputation and to privacy:” “The Rights and Duties of the Faithful according to the Code of Canon Law,” 42. See his reflections on respecting the right to privacy in IDEM, “The Response of the Eastern Catholic Churches in North America to the Sexual Abuse Crisis,” in Georges RUYSSSEN and Sunny KOKKARAVAYIL (eds.), *Il CCEO – Strumento per il futuro delle Chiese orientali cattoliche. Atti del Simposio di Roma, 22-24 febbraio 2017, Centenario del Pontificio Istituto Orientale (1917-2017)*, Kanonica 25, Rome, Valore Italiano, 2017, 814-816.

²⁶ Ronny E. JENKINS observes: “Jurisprudence arising out of the codified ecclesiastical law has ... consistently recognized the natural character of the right to a good reputation and the

The legislator for the Code highly esteems the importance of a good reputation. A person who damages the good reputation [*bona fama*] of someone can be punished with a just penalty.

Canon 1390 – § 1. A person who falsely denounces before an ecclesiastical superior a confessor for the delict mentioned in canon 1386 incurs a *latae sententiae* interdict and, if he is a cleric, also a suspension.

§ 2. A person who offers an ecclesiastical superior any other calumnious denunciation of a delict or who otherwise injures the good reputation of another can be punished with a just penalty, not excluding a censure.

§ 3. A calumniator can also be forced to make suitable reparation.

Canon 1390 prohibits illegitimate prejudice to one's good reputation. In certain contexts, it is permitted and even required to bring to the attention of competent persons the inappropriate acts of others, such as the sexual abuse of a minor or vulnerable person, which could thus damage their reputation. To refrain from informing competent persons of such inappropriate acts can result in continued harm to others and to the common good. Contacting the appropriate superiors is proper, even though harm will come to the perpetrator's good name. The informant acts legitimately.

The Code requires that the preliminary investigation of an allegation of sexual abuse be conducted in such a fashion that the alleged offender does not lose his or her good reputation. Canon 1717 § 2 states: "Care must be taken so that the good name [*bonum nomen*] of anyone is not endangered from this investigation."²⁷

If the preliminary investigation does not provide a sufficient basis for the ordinary to proceed with a penal process, or if any information gathered during the preliminary investigation is not needed for the penal process, canon 1719 pertains: "The acts of the investigation, the decrees of the ordinary which initiated and concluded the investigation, and everything which preceded the investigation are to be kept in the secret archive of the curia if they are not necessary for the penal process."²⁸ Obviously, maintaining these records in the secret archive (c. 489) will serve a twofold purpose. Should convincing information later surface that the person had committed the

legitimate means available to protect and defend it:" "Defamation of Character in Canonical Doctrine and Jurisprudence," in *StC*, 36 (2002), 421; see 435-461.

²⁷ CONGREGATION FOR THE DOCTRINE OF THE FAITH, Circular Letter to Assist Episcopal Conferences in Developing Guidelines for Dealing with Cases of Sexual Abuse of Minors Perpetrated by Clerics, art. III, d.): "investigation of accusations is to be done with due respect for the principle of privacy and the good name of the persons involved."

²⁸ Nowadays, it may be more prudent to speak of a "confidential archive," rather than a "secret archive." Both denote the same reality, though perhaps with different connotations.

delict, the ordinary will not appear to have been negligent by not having conducted a preliminary investigation.²⁹ Should such information never surface, the good reputation of the accused person will remain protected.

Moreover, canon 128 states: “Whoever illegitimately inflicts damage upon someone by a juridic act or by any other act placed with malice or negligence is obliged to repair the damage inflicted.”³⁰ Put another way, one whose name has been illegitimately harmed has the right to reparation of the damages. If someone is falsely accused of misconduct, the accusers must make restitution. If one’s good reputation is harmed by ecclesiastical authorities not following canonical norms, they must make restitution.³¹

The Church guarantees the right to privacy in a number of contexts. For example, everything that is shared in confession must be kept in the strictest confidence. “The sacramental seal is inviolable; therefore, it is absolutely forbidden for a confessor to betray in any way a penitent in words or in any manner and for any reason” (c. 983 § 1). Moreover, “[t]he interpreter, if there is one, and all others who in any way have knowledge of sins from confession are obliged to observe secrecy” (c. 983 § 2). The absolute confidentiality of sacramental confession has been re-emphasized recently by the Apostolic Penitentiary.³²

²⁹ See Frederick C. EASTON, “Responding to a New Allegation of Sexual Abuse of Minors after Resolution of Previous Allegations,” in *CLSAP*, 78 (2016), 172-186.

³⁰ Of course, a victim of defamation may also pursue civil reparation of damages. See Gregory T. BITTNER, *Should the Right to a Good Reputation Be Protected through the “Canonization of Civil Law”?* (JCD thesis), Ottawa, Saint Paul University, 1991; Margaret POLL CHALMERS, “The Remedy of Harm in Accord with Canon 128,” in *StC*, 38 (2004), 111-154; Jan HENDRIKS, “Canone 128: riparazione del danno. Obblighi e responsabilità del vescovo diocesano,” in *IE*, 15 (2003), 427-457.

³¹ JENKINS comments: “Assuredly, in all cases the superior is always to safeguard the good name of the one under [the preliminary] investigation, or concerning whom counsel is sought. But the success of the investigation presupposes revealing its subject matter. It is this revelation that might inadvertently harm the reputation of the one against whom the allegation is made. If this occurs, repair to the good name should be a priority where the accusation proves unfounded. However, if the superior were to exceed prudent limits while investigating the matter, an accusation might be brought charging negligent defamation:” “Defamation of Character,” 448.

In this context, attention would rightly be given to the publications of the names of clergy, oftentimes even deceased, against whom some allegation of sexual abuse has been made. The decision whether to publish such a list involves multiple values. See PONTIFICAL COUNCIL FOR LEGISLATIVE TEXTS, Private response, 15 September 2016, in the Appendix to this study.

³² APOSTOLIC PENITENTIARY, *Nota della Penitenzieria apostolica sull'importanza del foro interne e l'invulnerabilità del sigillo sacramentale*, 29 June 2019, at www.vatican.va. See also canons 1388; 1548 § 2, 1°; 1550 § 2, 2°.

In all circumstances, privacy aims to protect the rights of individuals, and confidentiality aims to ensure the discovery of the truth. Outside the context of the sacrament of penance, however, the right to privacy cannot be invoked to cover criminal activities or to compromise appropriate transparency. In fact, on 6 December 2019, Pope Francis issued an instruction on confidentiality,³³ in which he says that the “pontifical secret”³⁴ does not apply to questions relating to allegations of sexual abuse of minors and vulnerable persons:

1. The pontifical secret does not apply to accusations, trials and decisions involving the offences referred to in:
 - a) Article 1 of the motu proprio *Vos estis lux mundi* (7 May 2019);
 - b) Article 6 of the *Normae de gravioribus delictis* reserved to the judgement of the Congregation for the Doctrine of the Faith, in accordance with the motu proprio *Sacramentorum sanctitatis tutela* of Saint John Paul II (30 April 2001), and subsequent amendments.
2. Nor does the pontifical secret apply when such offenses were committed in conjunction with other offences.
3. In the cases referred to in No. 1, the information is to be treated in such a way as to ensure its security, integrity, and confidentiality in accordance with the prescriptions of canons 471, 2° *CIC* and 244 § 2, 2° *CCEO*, for the sake of protecting the good name, image, and privacy of all persons involved.
4. Office confidentiality shall not prevent the fulfilment of the obligations laid down in all places by civil laws, including any reporting obligations, and the execution of enforceable requests of civil judicial authorities.
5. The person who files the report, the person who alleges to have been harmed and the witnesses shall not be bound by any obligation of silence with regard to matters involving the case.

³³ SECRETARIAT OF STATE, Rescript *ex audientia Ssmm.*, Instruction on the Confidentiality of Legal Proceedings, 6 December 2019, at www.vatican.va.

³⁴ See Justin GLYN, “Less Than Meets the Eye: The Pontifical Secret and Analogous Provisions,” in *The Canonist*, 10 (2019), 37-46; IDEM, “Commentary on Instruction on the Confidentiality of Legal Proceedings,” in *The Canonist*, 10 (2019), 141-143; Ian WATERS, “The Law of Secrecy in the Latin Church,” in *The Canonist*, 7 (2016), 75-87.

5 — *The Right to Know One's Accusers and the Accusation*

The accused has the fundamental right to know the details and source of the accusation.³⁵ Without knowing this information, the accused is deprived of the right of legitimate self-defense.

A problem arises when accusations are made anonymously.³⁶ It is appropriate to distinguish two types of anonymous accusations. Some can be verified easily (for example, an anonymous accusation says that a priest has misappropriated parish funds; this can easily be verified by an audit of parish finances). However, other charges cannot be verified so easily (for example, an informer claims to be sexually exploited by a religious sister, but the informer will not identify himself nor the alleged abuser). It would

³⁵ Notwithstanding these reflections, a special difficulty arises with identifying one who accuses a confessor of committing a *delictum gravius* against the sacrament of penance (i.e., absolution of an accomplice, solicitation to sin against the sixth commandment with the confessor himself, direct and indirect violation of the sacramental seal, recording or divulging by means of social communication what is said by the confessor or penitent in confession). Article 24 of the 2010 *Normae de gravioribus delictis* states:

§ 1. In cases concerning the delicts mentioned of in art. 4 § 1, the Tribunal cannot indicate the name of the accuser to either the accused or his patron unless the accuser has expressly consented.

§ 2. This same Tribunal must consider the particular importance of the question concerning the credibility of the accuser.

§ 3. Nevertheless, it must always be observed that any danger of violating the sacramental seal be altogether avoided.

The obvious basis of Article 24 is the inviolable nature of the seal of confession. Clearly, in such an instance the CDF must make special provisions to ascertain the credibility of the accuser and to protect the rights of the accused confessor. See Charles J. SCICLUNA, "The Procedure and Praxis of the Congregation for the Doctrine of the Faith Regarding *Graviora Delicta*," in *CLSGBI Newsletter*, 139 (2004), 6-11.

There is no other situation identified in the law wherewith the identity of an accuser will not be divulged to the accused. Indeed, the accuser is essentially a witness: see the discussions of the *coetus De processibus* on 28 February 1980 in *Comm*, 12 (1980), 194.

³⁶ Thomas John PAPROCKI reflects: "The person affected by an [accusation] should be provided with all available factors.... Anonymous or secret information should not be considered. This is necessary in order to refute false or misleading information:" "Rights of Christians in the Local Church: Canon Law Procedures in Light of Civil Law Principles of Administrative Justice," in *SiC*, 24 (1990), 437. See also IDEM, *Vindication and Defense of the Rights of the Christian Faithful through Administrative Recourse in the Local Church* (JCD thesis), Rome, Pontifical Gregorian University, 1991; Thomas O. MARTIN, "Anonymous Denunciation," in *Jur*, 7 (1947), 66-69. Martin suggests that more weight would be given to multiple anonymous denunciations which obviously originate from different sources.

be prudent for the competent ecclesiastical authority to pursue the former; failing to do so may be negligent. But, it is impossible to pursue the latter.³⁷

In accordance with everyone's right to know charges against him or her, it is appropriate that the competent authority inform the accused of the details of the accusation in a timely manner. Indeed, the accused's response may verify that the charge is frivolous (for example, the accused may explain that the circumstances indicated in the charge are impossible) or, on the contrary, the accused may admit the veracity of the allegation and the appropriate remedy could be sought, without excluding therapeutic assistance and ecclesiastical penalties.

If someone makes an accusation which leads to a canonical penal process, the allegation must eventually need to be repeated *in processu*. The judge will be very careful to verify the veracity and the good intention of the accuser.³⁸ The declaration must be made under oath "to speak the whole truth and only the truth" (c. 1562). The statement must be put into writing by the notary (c. 1567) and signed by the witness, the judge, and the notary (c. 1569 § 2), after the witness has heard the testimony and been given the opportunity "to add, suppress, correct, or change it" (c. 1569 § 1). If a witness refuses to take the oath, he or she is to be heard nonetheless (c. 1562 § 2), and the notary is to make an annotation about the refusal (c. 1568). Obviously, the refusal to make an allegation under oath will bring into question the veracity of the testimony and favor the cause of the defendant.

³⁷ The weight to be given to anonymous documents is addressed in *Dignitas connubii*: "So-called anonymous letters and other anonymous documents of any kind whatsoever, per se cannot be considered even an indication, unless they describe facts which can be verified from other sources, and only to the extent that they can be so verified" (DC, art. 188). This literally reiterates SACRED CONGREGATION FOR THE DISCIPLINE OF THE SACRAMENTS, Instruction *Provida Mater*, in AAS, 28 (1936), 313-372, art. 165; see also IDEM, Decree *Catholica doctrina*, 7 May 1923, in AAS, 15 (1923), 389-436, art. 77 § 1: "No document has credit unless it proved to be authentic and genuine."

Further, see the SACRED CONGREGATION OF THE HOLY OFFICE, instruction *Crimen sollicitationis*, art. 20: "Anonymous denunciations are generally to be disregarded; they may however have some corroborative value, or provide an occasion for further investigations, if particular circumstances make the accusation plausible (cf. c. 1942 § 2):" *Crimen sollicitationis*, 16 March 1962, Vatican City, Typis polyglottis vaticanis, 1962, English at www.vatican.va/resources/crimensollicitationis1962.

³⁸ Angelo G. URRU observes: "In accepting the accusations presented to the ordinary, there is sometimes a trend to consider them too readily as authentic, and that the accusers are reliable and acting in good faith, whereas this too must be proven:" "Considerations on Imposing Penalties in Specific Cases," in DUGAN (ed.), *The Penal Process*, 145-182.

The 1917 Code permitted ordinaries to impose suspension, total or partial, upon a cleric *ex informata conscientia* (1917/*CIC*, cc. 2186-2194). The provision allowed them to impose this penalty in virtue of the ordinary's informed conscience *without any judicial process or canonical admonitions*. The provision of *suspensio ex informata conscientia* does not exist in the 1983 Code³⁹ and can no longer be invoked.⁴⁰ Now, for a cleric to be subject to a penal sanction, he must be informed of the alleged delict and proofs (i.e., the names of his accusers)⁴¹ and be given the right to defense, either through the judicial process (see c. 1721) or the extrajudicial process (c. 1720).

6 — Rights in the Canonical Penal Process

The accused has the fundamental “right” to the several rights provided by the canonical penal process.⁴² If penalties are imposed, the guilty person has the right to expect that they will be imposed through a canonical penal process.⁴³

³⁹ See Kenneth E. BOCCAFOLA, “The Special Penal Norms of the United States and Their Application,” in *ibid.*, 279-283.

⁴⁰ That the provision of *suspensio ex informata conscientia* no longer exists is assured by canon 6 § 1, 4° which states: “When this Code takes force, the following are abrogated: ... Any universal or particular penal laws whatsoever issued by the Apostolic See unless they are contained in the Code.” John P. BEAL remarks: “The suspension *ex informata conscientia* has been abrogated – and we ought to keep reminding our bishops that it no longer exists.” “To Be or Not to Be, That Is the Question: The Rights of the Accused in the Canonical Penal Process,” in *CLSAP*, 53 (1991), 95 [= BEAL, “To Be or Not to Be”].

⁴¹ Canon 1598 § 1 requires that in the judicial penal process the judge, “under penalty of nullity,” allow the accused and his advocate to inspect the acts of the case. It adds, “In cases pertaining to the public good to avoid a most grave danger the judge can decree that a specific act must be shown to no one; the judge is to take care, however that *the right of defense always remains intact*” [emphasis added]. The same would apply, *mutatis mutandis*, in the extrajudicial process, wherein the ordinary “is to inform the accused of the accusation and the proofs, giving an opportunity for self-defense” (c. 1720, 1°). There is no just reason to take away the right to one’s self-defense by refusing to divulge either the names of the accusers or the nature of the allegations.

⁴² See Francis G. MORRISEY, “The Pastoral and Juridical Dimensions of Dismissal from the Clerical State and of Other Penalties for Acts of Sexual Misconduct,” in *CLSAP*, 53 (1991), 233-234. Morrisey observes that those drafting the penal law of the 1983 Code had rejected a proposal whereby a defendant would be able to seek a judicial process (233; fn. 20: see *Comm*, 12 [1980], 191).

⁴³ John P. BEAL comments about canon 221 § 2: “Inherent in this right, is the right to be constituted as an accused and to be accorded all the substantive and procedural rights of an accused before canonical penalties are inflicted or declared. Although this principle seems almost tautological, it has been and, unfortunately, continues to be frequently ignored and all too often skirted.

As mentioned earlier, the investigation and judgment concerning the delict of sexual abuse of a minor by a *cleric* is reserved to the Congregation for the Doctrine of the Faith, as explained in the Congregation's 21 May 2010 *Normae de gravioribus delictis*:

Article 16 – Whenever the Ordinary or Hierarch receives a report of a more grave delict, which has at least the semblance of truth, once the preliminary investigation has been completed, he is to communicate the matter to the Congregation for the Doctrine of the Faith which, unless it calls the case to itself due to particular circumstances, will direct the Ordinary or Hierarch how to proceed further, with due regard, however, for the right to appeal, if the case warrants, against a sentence of the first instance only to the Supreme Tribunal of this same Congregation.⁴⁴

If the allegation lacks the semblance of truth, the ordinary does not forward the acts of the preliminary investigation to the Congregation. However, if the allegation does have the semblance of truth, the ordinary must forward the acts of the preliminary investigation to the Congregation, which will direct the ordinary on how to proceed, according to its *Normae*.

Article 21 – § 1. The more grave delicts reserved to the Congregation for the Doctrine of the Faith are to be tried in a judicial process.

§ 2. However, the Congregation for the Doctrine of the Faith may:

1° decide, in individual cases, *ex officio* or when requested by the Ordinary or Hierarch, to proceed by extrajudicial decree, as provided in canon 1720 of the Code of Canon Law and canon 1486 of the Code of Canons of the Eastern Churches. However, perpetual expiatory penalties may only be imposed by mandate of the Congregation for the Doctrine of the Faith.

2° present the most grave cases to the decision of the Roman Pontiff with regard to dismissal from the clerical state or deposition, together with dispensation from the law of celibacy, when it is manifestly evident that the delict was committed and after having given the guilty party the possibility of defending himself.⁴⁵

Notwithstanding the 2010 *Normae*, the procedural rights of the accused also pertain *mutatis mutandis* in the penal procedures concerning the delict of sexual abuse of a minor by a cleric reserved to the Congregation for the Doctrine of the Faith.

To avoid the tedious complexities of the law designed to protect the rights of the faithful, a variety of ingenious strategies have been devised to inflict the equivalent of penalties by other means without the procedure required by law and often without any procedure at all.” BEAL, “To Be or Not to Be,” 87.

⁴⁴ CDF, *Normae de gravioribus delictis*, art. 16.

⁴⁵ *Ibid.*, art. 21.

6.1 — The Right to the Preliminary Investigation (Unless It Is “Entirely Superfluous”)

The law *requires* that, whenever an ordinary has knowledge “which at least seems true” concerning a delict, he is to conduct a preliminary investigation,⁴⁶

⁴⁶ For further reflections on the penal preliminary investigation, see Damià G. ASTIGUETA, “L’investigazione previa,” in Andrea D’AUREA and Claudio PAPALE (eds.), *I delitti riservati alla Congregazione per la dottrina della fede*, Quaderni di ius missionale 3, Rome, Urbaniana University Press, 2014, 79-108; IDEM, “L’investigazione previa: alcune problematiche,” in *Per*, 98 (2009), 195-233; Francisco José CAMPOS MARTÍNEZ, “Presunción de inocencia e investigación previa canónica. Pautas para un procedimiento justo en denuncias por abuso sexual,” in *Per*, 108 (2019), 471-516; Myriam CORTÉS DIÉGUEZ, “La investigación previa y el proceso administrativo penal,” in *REDC*, 70 (2013), 513-545; Frans DANEELS, “Alcune osservazioni sul processo penale canonico e la sua efficacia,” in *Folia canonica*, 7 (2004), 197-207; IDEM, “L’investigazione previa nei casi di abuso sessuale di minori,” in James J. CONN and Luigi SABBARESE (eds.), *Iustitia in caritate: Miscellanea di studi in onore di Velasio de Paolis*, Rome, Urbaniana University Press, 2005, 499-506; Elena DI BERNARDO, “Modelli processuali e finalità perseguite nell’istruttorio civile e canonico. Rilievi comparativi,” in *Ap*, 86 (2013), 19-57; John J. FOLEY, “Preliminary Investigation: Considerations and Options,” in Patricia M. DUGAN (ed.), *Towards Future Developments in Penal Law: U.S. Theory and Practice: A Symposium Held under the Auspices of the Pontifical Council for Legislative Texts at the Pontifical University of the Holy Cross, Rome, March 5-6, 2009*, Montreal, Wilson & Lafleur, 2010, 36-38; Lucia GRAZIANO, “La praevia investigatio e la tutela dei diritti nell’ordinamento penale canonico,” in Davide CITO (ed.), *Processo penale e tutela dei diritti nell’ordinamento canonico*, Pontificia Università della Santa Croce, Monografie giuridiche 28, Milan, Editore Giuffrè, 2005, 491-510; Antonio INTER-GUGLIELMI, “Le questioni della definizione dei limiti e della sufficienza delle garanzie per l’indagato nello svolgimento dell’indagine previa ‘ex can. 1721, CIC’,” in Janusz KOWAL and Joaquín LLOBELL (eds.), *“Iustitia et iudicium”: Studi di diritto matrimoniale e processuale canonico in onore di Antoni Stankiewicz*, 4 vols., Vatican City, Libreria editrice vaticana, 2010, vol. 4, 2145-2166 [= KOWAL and LLOBELL (eds.), “*Iustitia et iudicium*”]; Sebastian S. KARAMBAI, “Delict of Sexual Abuse by Clerics: The Complaint and Preliminary Investigation,” in *Vidyajyoti*, 80 (2016), 524-537; Patrick R. LAGGES, “Elements of the Preliminary Investigation,” in DUGAN (ed.), *Advocacy Vademecum*, 153-168; IDEM, “The Penal Process: The Preliminary Investigation in Light of the *Essential Norms* of the United States,” in *StC*, 38 (2004), 369-410; Francis G. MORRISEY, “The Preliminary Investigation in Penal Cases – Some of the Better Practices,” in *The Canonist*, 2 (2011), 184-198; James T. O’REILLY and Margaret S.P. CHALMERS, *The Clergy Sex Abuse Crisis and the Legal Responses*, New York, Oxford University Press, 2014, 313-342; Luigi ORTAGLIO, “L’indagine previa nei casi di *delicta graviora*,” in ASSOCIAZIONE CANONISTICA ITALIANA (ed.), *Questioni attuali di diritto penale canonico*, Studi giuridici 96, Vatican City, Libreria editrice vaticana, 2012, 95-111; Francisco J. RAMOS, “La investigación previa en el Código de derecho canónico (CIC, cann. 1717-1719),” in KOWAL and LLOBELL (eds.), “*Iustitia et iudicium*,” vol. 4, 2019-2134; Raúl ROMÁN SÁNCHEZ, “La investigación previa al proceso penal canónico y la defensa del acusado,” in *REDC*, 74 (2017), 217-236; José Luis SÁNCHEZ-GIRÓN RENEDO, “La investigación previa al proceso penal canónico y la defensa del acusado,” in *REDC*, 74 (2017), 217-236; José M. SERRANO RUIZ, “Cuestiones actuales de

personally⁴⁷ or through another suitable person,⁴⁸ “about the facts, circumstances, and imputability, unless such an inquiry seems entirely superfluous” (c. 1717 § 1), as would be the case when the accused admits the delict. The investigation’s purpose is “to collect evidence that can ‘hold up’ in a canonical trial.”⁴⁹ Thomas J. Green reflects:

Before the [penal] process can be initiated, there must be a strong probability that an ecclesiastical delict has been committed. It is unjust to penalize someone merely because of an allegation of a delict...

The preliminary investigation is geared to ascertaining whether there are solid grounds for judging that an ecclesiastical delict (e.g., cc. 1364-1399) has been committed. The investigator should carefully inquire about the character and background of the accuser(s) and differentiate facts from rumor, suspicion, opinion, the personal propensities of the accused, and even his/her past behavior (c. 1572)...

The preliminary inquiry should examine the relevant facts of the case, factors affecting the imputability of the accused (cc. 1322-1327), and possible canonical and civil damages. In other words, the investigation should clarify the initial profile of the alleged delict.

... whether the investigation has been conducted or not [as occurs when the investigation is superfluous], it is not necessary that the alleged delict be

derecho procesal penal canónico,” in *Anuario argentino de derecho canónico*, 17 (2011), 119-146; Anzelm Szabolcs SZUROMI, “Le particolarità dell’indagine previa nel processo penale canonico,” in KOWAL and LLOBELL (eds.), “*Iustitia et iudicium*”, vol. 4, 2135-2143; Desiderio VAJANI, “La procedura canonica a livello diocesano nel caso di *delicta graviora*,” in *QDE*, 25 (2012), 316-355.

⁴⁷ Canonists commonly recommend that the ordinary entrust the preliminary investigation to another. See Angelo G. URRU, “Considerations on Imposing Penalties in Specific Cases,” 295. Canon 1717 § 3 says that the investigator cannot later be a judge in the same matter in a subsequent judicial process. This raises the question of whether the ordinary, if he investigated the alleged crime, would appropriately address the alleged delict through the extrajudicial process (c. 1720). John P. BEAL comments: “If the ordinary has played an active role in the prior investigation, an exception should be raised to his serving as decision-maker even in [the] administrative process.” “To Be or Not to Be, That Is the Question,” 92. In a later study, BEAL notes that 1917/CIC canon 1940 dissuaded the bishop from conducting the preliminary investigation and observes: “Should the bishop conduct the investigation himself, his subsequent involvement in determining whether a penal process should be instituted or what penal or pastoral remedies are appropriate would be tainted by at least the perception of bias.” “Doing What One Can,” in *Jur*, 52 (1992), 648.

⁴⁸ Canon 1717 § 3 identifies the role of the investigator: “The person who conducts the investigation has the same powers and obligations as an auditor in the process; the same person cannot act as a judge in the matter if a judicial process is initiated later.” The role of an auditor is explained in canons 1428-1429.

⁴⁹ BEAL, “Doing What One Can,” 634. See James T. KEANE, “If a priest is ‘credibly accused’ of sexual abuse, what does that mean? Depends whom you ask,” in *America Magazine*, 20 December 2018, at www.america.magazine.org.

certain; it suffices that there be a strong probability that it has been committed... The determination of the existence of a delict with moral certitude ... is the task of the subsequent penal process.⁵⁰

Throughout this preliminary investigation, care must be taken to avoid harming the good name of the person being investigated (c. 1717 § 2). The preliminary investigation is opened and closed by a decree of the ordinary (see c. 1718 § 2).⁵¹

The Latin Code of Canon Law does *not* state that the ordinary must involve the accused in the process of the preliminary investigation. Nonetheless, canon 50 requires the ordinary “to hear those whose rights can be injured” by the decree: namely, the persons about whom an allegation has been made.⁵² Indeed, the 2011 circular letter of the Congregation for the Doctrine of the Faith states: “unless there are serious contrary indications, even in the course of the preliminary investigation, the accused cleric should be informed of the accusation, and given the opportunity to respond to it.”⁵³ Significantly, the Code of Canons of the Eastern Churches, unlike the Latin Code, states explicitly that the hierarch is to hear the accused and the promoter of justice at the conclusion of the preliminary and before deciding whether or not to initiate a judicial or extrajudicial penal process (*CCEO*, c. 1469 § 3).

Only after the findings (*elementa*: c. 1718 §§ 1-2) of this preliminary investigation have been presented to him is the ordinary to decide on next steps. He will determine whether it is expedient to initiate a penal process to

⁵⁰ Thomas J. GREEN, Commentary on Canon 1717, in *CLSA Comm2*, 1807-1808.

⁵¹ Canon 1718 § 2 makes reference to the ordinary revoking or changing the decree mentioned in the preceding paragraph (which contains no mention of a decree). The law implies that the preliminary investigation closes with a decree; implicitly, it would also begin with one. The Code of Canons of the Eastern Churches, canon 1469 § 3, unlike the Latin Code, requires that the hierarch hear the accused and the promoter of justice (and, if he judges it expedient, two judges or other legal experts) before closing the preliminary investigation. Thus, the Eastern Code, unlike the Latin one, requires that the accused be informed of the accusation during the preliminary investigation. See Thomas J. GREEN, “Penal Law in the Code of Canon Law and in the Code of Canons of the Eastern Churches: Some Comparative Reflections,” in *StC*, 28 (1994), 442; Frederick C. EASTON, Commentary on Canon 1469, in John D. FARIS and Jobe ABBASS (eds.), *A Practical Commentary to the Code of Canons of the Eastern Churches*, Montréal, Wilson & Lafleur Ltée, 2019, 2621-2624 [= FARIS and ABBASS (eds.), *A Practical Commentary*].

⁵² John A. RENKEN, *The Penal Law of the Roman Catholic Church*, Ottawa, Saint Paul University, 2015, 393-394.

⁵³ CONGREGATION FOR THE DOCTRINE OF THE FAITH, “Circular Letter to Assist Episcopal Conferences in Developing Guidelines for Dealing with Cases of Sexual Abuse of Minors Perpetrated by Clerics,” art. III, e).

inflict or declare a penalty; indeed, the ordinary may decide to forego the penal process in favor of “fraternal correction or rebuke or other means of pastoral solicitude” in order to “sufficiently repair the scandal, restore justice, reform the offender” (c. 1341).⁵⁴ These options may be considered “pastoral solutions” selected by the ordinary instead of the penal process.⁵⁵

If the ordinary decides to proceed with a penal process, he may choose either the judicial process (cc. 1721, 1723-1728) or the extrajudicial process (c. 1720).⁵⁶ The Code prefers the judicial process: indeed, “just causes” (in the plural: c. 1342 § 1) must exist to preclude the judicial process from being used, giving the ordinary the occasion to employ the less preferred extrajudicial process.⁵⁷ The judicial process “provides greater means for respecting the rights of the accused.”⁵⁸ Also, perpetual penalties (such as dismissal from the clerical state) can be imposed *only* through a judicial process (c. 1342 § 2).⁵⁹

⁵⁴ See Jonas Benson OKOYE, *Canon 1341: Judicial and Pastoral Discretion in the Application of Canonical Penalties* (JCD thesis), Rome, Pontificia Università Lateranense, 2005.

⁵⁵ See Bruno GONÇALVES, “L’intelligence procédurale au service de l’efficience canonique,” in *AC*, 56 (2014-2015), 9-17.

⁵⁶ John P. BEAL, having analyzed the development of canon 1722, concludes that it applies both to the judicial process and the extrajudicial process: “The context of c. 1722 clearly and inextricably links its provisions on ‘administrative leave’ with a penal process, either administrative or judicial:” “Administrative Leave: Canon 1722 Revisited,” in *StC*, 27 (1993), 310.

⁵⁷ David CITO speaks of the “exceptionality” of the administrative penal process: “Exceptionality is given by the fact that canon 1342 § 1 provides that the administrative procedure is promoted only *quoties iustae obstant causae ne iudicialis processus fiat*:” “Prescription in Penal Matters,” in DUGAN (ed.), *The Penal Process*, 195, fn. 28.

Claudio PAPALE opines that “just causes” for an extrajudicial penal process exist when the accused person recognizes the personal misconduct and declares himself or herself responsible for the delict ascribed to him or her: *Formulario commentato del processo penale canonico*, Studia Canonica 62, Rome, Urbaniana University Press, 2012, 29. See also S.N. CHANDRA, *The Discretionary Power of the Bishop in the Penal Process in the Light of Canon 1342 § 2* (JCD thesis), Rome, Pontificia Universitas Urbaniana, 2004; Frederick EASTON, “The Preliminary Investigation,” in John A. ALESANDRO (ed.), *Penal and Disciplinary Situations Involving Priests and Deacons. What Can Be Done – and How?* Washington, D.C., CLSA, 2017, 36; RENKEN, *The Penal Law of the Roman Catholic Church*, 410-418.

⁵⁸ William E. WOESTMAN, *Ecclesiastical Sanctions and the Penal Process: A Commentary on the Code of Canon Law*, rev. ed., Ottawa, St. Paul University, 2003, 69 [= WOESTMAN, *Ecclesiastical Sanctions*].

⁵⁹ The Eastern Code permits the imposition of a penalty by an extrajudicial decree (*CCEO*, cc. 1486-1487) only “if there are grave causes that preclude a penal trial and the proofs concerning the delict are certain” and “provided it does not involve a privation of office, title, insignia or a suspension for more than one year, demotion to a lower grade, deposition or major excommunication” (*CCEO*, c. 1402 § 2). See Thomas J. GREEN, “Penal Law in the Code of Canon Law and in the Code of Canons of the Eastern Churches: Some Comparative

Some suggest that the judicial penal process is too burdensome and that the extrajudicial process is to be preferred. This argument, however, is weak. Franz Daneels comments that the same difficulties found in the judicial process must be addressed to pursue the extrajudicial process, which is clearly not preferred.⁶⁰

Should the judicial penal process be initiated, the tribunal will be composed of three judges in matters “concerning delicts which can entail the penalty of dismissal from the clerical state” (c. 1425 § 1, 2°). Lest there be the perception that the diocesan bishop exerts too great an influence on them,

Reflections,” 430; Frederick C. EASTON, Commentary on Canon 1402, in FARIS and ABBASS (eds.), *A Practical Commentary*, 2519-2521; IDEM, Commentary on Canons 1486-1487, in *ibid.*, 2649-2655.

BEAL reflects that “one should not resort to an administrative penal process unless a judicial process is impossible even though the crime can be proved in the external forum, unless it is useless because the matter is already certain, or unless it is harmful because in a particular case the demand for expedient action to protect the common good outweighs the right of the accused to the fullest juridic protection:” “To Be or Not to Be, That Is the Question,” 89.

See also Carlos LÓPEZ SEGOVIA, “El derecho a la defensa en el proceso penal administrativo,” in *Anuario de derecho canónico*, 3 (2014), 73-148; Jorge MIRAS, “Guía para el procedimiento administrativo canónico en materia penal,” in *IC*, 57 (2017), 323-385; Miquel PONS PORTELLA, “El procedimiento administrativo penal en el derecho canónico del siglo XXI,” in *REDC*, 75 (2018), 199-233; IDEM, “Los supuestos de aplicación extrajudicial de penas en el derecho canónico,” in *IC*, 58 (2018), 121-148.

⁶⁰ Franz DANEELS writes:

- (1) Even in the administrative process one can never prescind from the need of reaching moral certainty and to respect the right of defense, which has its foundation in natural law.
- (2) The judicial process frees the ordinary from the odious reality of having to carry out the administrative penal process, given that the carrying out of the judicial process *de more* pertains to a third party, namely, the judge.
- (3) The lack of personnel trained for a judicial penal process confirms the urgent necessity of preparing them and in any case it is improbable that in the same circumstances, that is, in the absence of trained personnel, an administrative penal process can be carried out with the requirements of the law.
- (4) One can hardly understand how it would be possible to gather the necessary proofs in an administrative penal process if it would not be possible in a judicial process.
- (5) Even in the administrative penal process there is the possibility of a *remonstratio*, hierarchical recourse, and finally contentious-administrative recourse to the Apostolic Signatura, whose experience demonstrates that not even the choice of the administrative penal process guarantees that there will not be delays.

In conclusion, it seems that the difficulty or the impossibility of the judicial penal process is being exaggerated while, at least in complicated cases, even in an administrative penal process there would probably be the same or even a greater difficulty in arriving at moral certitude with due respect for the right of defense.

“The Administrative Imposition of Penalties,” in DUGAN (ed.), *The Penal Process*, 252-253.

it would seem prudent that these be judges from outside the diocese. The judges, not the diocesan bishop, make the decision about any penalty to be imposed on the accused.⁶¹

6.2 — Procedural Rights in the Ordinary Contentious Process

Should the judicial penal process occur, which follows the canons on trials in general and the ordinary contentious trial “unless the nature of the matter precludes it” (c. 1728 § 1), the accused is assured numerous procedural rights, among which are the following. Indeed, *mutatis mutandis*, these rights also pertain during the extrajudicial penal process.

1. The right to receive the citation (cc. 1507-1512), to which is attached the *libellus* stating the allegations, “unless for a grave cause the judge determines that the *libellus* must not be made known to the party before that party makes a deposition in the trial” (c. 1508), in which case the *libellus* would be communicated after the accused has had the opportunity to make his declaration; the citation must indicate “at least generally, the facts and proofs which will prove the allegations” (c. 1504, 2°). The *libellus* will indicate both the accusation and the accusers. Not citing the accused legitimately results in a null process (c. 1511).
2. The right to receive the judge’s decree, which defines the terms of the controversy (c. 1513)
3. The right to self-defense (see c. 1598 § 1) which, if denied, results in “irremediable nullity” (c. 1620, 7°).⁶²
4. The right to bring forward proofs of any kind which are licit and useful for adjudicating the case (c. 1527 § 1)

⁶¹ Angelo G. URRU comments: “It is inadmissible for an ordinary, with respect to accusations he considers founded or even certain, to opt for the judicial process simply in order to consolidate and ratify his convictions by the tribunal handing down a sentence against the accused. Sometimes, the judge has this impression for two reasons: because of the manner in which the ordinary behaves before starting the process, or of the manner in which he expresses, after the process, his disappointment in the outcome because it does not conform to his own expectations:” “Considerations on Imposing Penalties in Specific Cases,” 295.

⁶² Pope JOHN PAUL II offered extensive reflections on the right to self-defense in marriage nullity trials. *Mutatis mutandis*, the same rights pertain in penal processes. Allocution to the Roman Rota, 26 January 1989, in AAS, 81 (1989), 922-927; English translation in William H. WOESTMAN (ed.), *Papal Allocutions to the Roman Rota, 1939-2002*, 204-208.

5. The right to insist that a proof rejected by the judge be accepted, a matter to be resolved by the same judge as promptly as possible (c. 1527 § 2)⁶³
6. The right to be told the names of witnesses before they are examined, although the judge may prudently determine that, when this can be done only with great difficulty, the names of witnesses may be told to the accused later, “at least before the publication of the acts” (c. 1554)
7. The right to renounce a witness proposed by the accused, although the promoter of justice can request that the witness be examined nonetheless (c. 1551)
8. The right to offer to the judge questions to be put to the witnesses (c. 1561)
9. The right to suggest experts to be appointed by the judge, or to present previous expert reports to be accepted by the judge (c. 1575)
10. The right to designate private experts, whom the judge must approve (c. 1581 § 1)
11. The right, with his or her advocate and under pain of the nullity of the process, to examine the proofs collected which he or she does not yet know; however, “[i]n cases pertaining to the public good to avoid a most grave danger the judge can decree that a specific act must be shown to no one; the judge is to take care, however, that the right of defense always remains intact” (c. 1598 § 1).
12. The right to propose to the judge additional proofs after the publication of the acts (c. 1598 § 2)
13. The right to present a defense brief within a suitable period of time (c. 1601), and to respond to the observations of the promoter of justice (c. 1603 § 1)
14. The right to receive a judgment based on the judge’s moral certitude (c. 1608 § 1)
15. The right to know the decision (c. 1614) and to receive a copy of the sentence (c. 1615)⁶⁴

⁶³ Robert W. OLIVER, “The Responsibilities of Judges for the Admission of Proofs in a Penal Trial,” in Kurt MARTENS (ed.), *A Service Beyond All Recompense: Essays Offered in Honor of Monsignor Thomas J. Green*, Washington, D.C., The Catholic University of America Press, 2018, 269-285 [= MARTENS (ed.), *A Service Beyond All Recompense*].

⁶⁴ A sentence “has no effect before publication even if the dispositive part was made known to the parties with the permission of the judge” beforehand (c. 1614). The publication or

16. The right to lodge an appeal against the sentence (c. 1628), which suspends any penalty which has been imposed (c. 1353)
17. The right to lodge a complaint of nullity (cc. 1619-1627), which can be proposed even after a sentence has become a *res iudicata* but which does not suspend the execution of the decision⁶⁵
18. The right to seek a *restitutio in integrum* (cc. 1645-1648) after a sentence has become a *res iudicata* when the falsehood of the proofs upon which the decision was based is established, when documents are discovered which will lead to a contrary decision, when the decision was rendered due to malice (*dolus*), etc.

6.3 — The Right to Counter the Presumption of Imputability

When it is demonstrated that the accused did commit the alleged delict, the imputability of the accused for the offense is presumed (c. 1321 §3).⁶⁶ Legal imputability is required to prosecute a delict. The canonical penal process gives the accused the right to prove that he or she lacked imputability (see c. 1323), or that his or her imputability was diminished (see c. 1324).⁶⁷ This presumption is overturned by contrary proof (see cc. 1584-1586).⁶⁸ In the penal process, the accused has the occasion to overturn the

communication of the sentence can be done in one of two ways: (1) by giving a copy of the sentence to the parties or their procurators [note that giving a copy of the sentence to one's advocate does not fulfill the legal requirement of publication] or (2) by sending a copy through the public postal services or some other very secure method according to the norms of particular law (c. 1615; cf. c. 1509 §1). Concerning the right to receive a copy of the sentence with an indication of means to challenge the decision, see JOHN PAUL II, Allocution to the Roman Rota, 26 January 1989, 922-927; English translation in WOESTMAN (ed.), *Papal Allocutions to the Roman Rota, 1939-2002*, 204-208.

⁶⁵ Of course, if the accused receives a favorable response to his complaint of nullity, the penalty ceases *ipso iure*, since the response to his or her complaint indicates that the sentence is invalid.

⁶⁶ See Michael HUGHES, "The Presumption of Imputability in Canon 1321 §3," in *StC*, 21 (1987), 19-36; Elizabeth McDONOUGH, "A Gloss on Canon 1321," in *StC*, 21 (1987), 381-390.

⁶⁷ See MORRISEY, "The Pastoral and Juridical Dimensions of Dismissal from the Clerical State and of Other Penalties for Acts of Sexual Misconduct," 232.

⁶⁸ Thomas J. DOYLE comments: "The accused bears the burden of proof to overturn the presumption of malice or culpability. In dealing with persons who have sexual contact with children, it follows that input from medical experts is necessary to determine if their disorder was such that it affected the will to the extent that imputability is either removed or diminished. Those who wish to impose penalties have no choice but to listen to medical science in this regard:" "The Canonical Rights of Priests Accused of Sexual Abuse," 345.

legal presumption of imputability. Indeed, if imputability is absent, “there is no true delict insofar as the subjective constitutive element of a canonical delict is lacking.”⁶⁹

6.4 — The Right to Lawful Imposition of “Administrative Leave”

The ordinary can place the accused on “administrative leave” but only in accordance with the law. The term “administrative leave” is not used in the Code, although it is commonly applied in reference to the provisions of canon 1722:

To prevent scandals, to protect the freedom of witnesses, and to guard the course of justice, the ordinary, after having heard the promoter of justice and cited the accused, at any stage of the process can exclude the accused from the sacred ministry or from some office and ecclesiastical function, can impose or forbid residence in some place or territory, or even can prohibit public participation in the Most Holy Eucharist. Once the cause ceases, all these measures must be revoked; they also end by the law itself when the penal process ceases.

Since this norm restricts the exercise of rights, it must be interpreted strictly (see c. 18). Among other things, this means that the restrictions can be imposed only in order (1) to prevent scandals (which may result if restrictions were not imposed), (2) to protect the freedom of witnesses (including the accusers), (3) to guard the course of justice (e.g., to prevent the continued exercise of the ministry which may intimidate persons from revealing the truth). Further, to impose one of the measures (e.g., to require residence in a certain place) does not require imposing all the possible restrictions. It is important to understand, moreover, that restrictions not mentioned in the canon cannot be imposed in virtue of it (e.g., forbidding a presbyter to wear clerical attire: see c. 284).⁷⁰

In a scholarly analysis of the development of canon 1722, John P. Beal convincingly concludes that its measures can be imposed only after the

⁶⁹ Lawrence DiNARDO, “The Judicial Penal Process,” in *Penal and Disciplinary Situations Involving Priests and Deacons. What Can Be Done – and How?* 59, quoting Andrea D’AURIA, “L’imputabilità nel diritto penale. Un’analisi comparata tra il C.I.C. e il C.C.E.O.,” in *Ap*, 75 (2002), 146.

⁷⁰ See Brendan DALY, “Administrative Leave of Priest Accused of Sexual Abuse,” in Arthur J. ESPELAGE (ed.), *CLSA Advisory Opinions, 2001-2005*, Alexandria, CLSA, 2006, 473-475 [= ESPELAGE (ed.), *CLSA Advisory Opinions, 2001-2005*]; Victor TAMAYO, “Canonico-Pastoral Implications of Placing a Cleric on ‘Administrative Leave,’” in *PCF*, 5 (2003), 115-120; William E. WOESTMAN, “Restricting the Right to Celebrate the Eucharist,” in *StC*, 29 (1995), 155-178.

conclusion of the preliminary investigation.⁷¹ Canon 1722 requires that the accused be cited before any of its restrictions are imposed. This provides the accused the occasion, should he or she take it, to provide some self-defense. Some may worry that, in light of serious accusations, the accused may continue to do harm during the preliminary investigation itself. This worry can be addressed successfully in most cases. First, if the serious allegation is convincing, the preliminary investigation need not last for a lengthy period, such that the ordinary may decide promptly how to proceed (see c. 1718) and consequently impose some or all of the restrictions permitted by canon 1722. Further, even during the preliminary investigation, the ordinary can inform the accused of the serious allegation and impose a penal precept (see c. 1319) proscribing some action (e.g., the action of which he or she has been accused, threatening the accusers, etc.); also, it may be possible for the accused to be somehow “monitored”⁷² (e.g., in the case of a cleric, by the vicar for clergy, the vicar forane, etc.) during the brief time that the preliminary investigation continues.

Moreover, if ecclesiastical authorities are awaiting the conclusions of a civil criminal process, the ecclesiastical preliminary investigation can start and end even before the civil process is concluded. Church authorities would recall that the preliminary investigation intends simply to uncover knowledge “which at least seems true” of a delict having been committed, and the fact that civil authorities are investigating an allegation would seem to contribute more than sufficiently to the knowledge prompting an ecclesiastical preliminary investigation.

According to the 2010 *Normae de gravioribus delictis*, if the judgment of the delict is reserved to the Congregation for the Doctrine of the Faith, the restrictions of canon 1722 can be imposed by the ordinary during the

⁷¹ BEAL, “Administrative Leave: Canon 1722 Revisited,” 316.

Francis G. MORRISEY observes: “A personal precept ... has as its major purpose to provide for the needs of the community and the observance of law. Since it is geared toward preventing future abuses, it often is applied before the fact, while the penal decree would be issued following a canonical process:” “Precept Imposing ‘Administrative Leave,’” in ESPELAGE (ed.), *CLSA Advisory Opinions, 2001-2005*, 478. See also Patrick J. COGAN, “Precept Imposing ‘Administrative Leave,’” in *ibid.*, 476-477.

⁷² BEAL mentions the penal remedy of vigilance (*vigilantia*) which existed in *CIC/17* canon 2311 and is found in *CCEO* canon 1428. It is not mentioned in the 1983 *CIC*. He comments: “Whether one holds that the listing of penal remedies in c. 1339 of the Latin Code is exhaustive or not, it seems clear that the equivalent of *vigilantia* can be imposed, where circumstances warrant, in virtue of the competence of ecclesiastical authority to restrict the free exercise of rights in the interest of the common good (c. 223 §3).” “Administrative Leave: Canon 1722 Revisited,” 315, fn. 55. See IDEM, “Doing What One Can,” 664-665.

preliminary investigation or by the presiding judge at the request of the promoter of justice. “With due regard for the right of the Ordinary to impose from the outset of the preliminary investigation those measures which are established in canon 1722 of the Code of Canon Law, or in canon 1473 of the Code of Canons of the Eastern Churches, the respective presiding judge may, at the request of the Promotor of Justice, exercise the same power under the same conditions determined in the canons themselves.”⁷³ It is important to note that this norm pertains *only* to the processing of allegations of a *gravius delictum*. For other delicts, the restrictions of canon 1722 cannot be imposed during the preliminary investigation by the ordinary, nor by the judge during the judicial penal process. They may be imposed only by the ordinary during the penal process, judicial or extrajudicial.

Even though the restrictions of canon 1722 result in what is commonly called “administrative leave” (not a penalty) and even though the accused is presumed innocent until proven otherwise, the publicity attached to an administrative leave may cause irreparable harm to his or her reputation. If the restrictions are placed with disregard for the canonical process (which permits their imposition only after the preliminary investigation is concluded, except if the allegation involves a *gravius delictum*), it is possible for the accused to pursue action for damages (cf. c. 128).

As the law itself states, the restrictions of canon 1722 must be revoked when the cause ceases, and they end *ipso iure* when the penal process ends. Further, canon 1726 requires that the accused must be absolved in a sentence when it becomes obvious to the judge that he or she did not commit the delict; obviously, at this moment the “administrative leave” likewise ends. The “administrative leave” also ends in accord with canon 1724, should the promoter of justice, at the direction or with the permission of the ordinary, renounce the trial. In this situation, however, the accused must accept the renunciation if he or she is not absent from the trial; the accused may wish to pursue the trial to conclude definitively his or her innocence of the allegation. The accused has the *right* not to accept the renunciation of the case proposed by the promoter of justice.⁷⁴

⁷³ CDF, *Normae* 2010, art. 19. See Francisco José CAMPOS MARTÍNEZ, “Derechos fundamentales del investigado y aplicación de medidas cautelares. Un estudio a partir del art. 19 de las ‘Normas sobre los delitos más graves,’” in *REDC*, 74 (2017), 369-423.

⁷⁴ Gregory D. INGELS observes that the reason for the norm of canon 1724 §2 is obvious: “A promoter of justice will most likely renounce a case only when it is clear that it is not going to be possible to prove the charges which have been made against the accused or obtain the desired penalty. By renouncing the action, this provides the ordinary with the opportunity of presenting the case once again should new and more convincing proofs be

The restrictions of canon 1722 are not a permanent resolution of a case. They are to be imposed *only* during the penal process, which is not to be a lengthy, on-going process.⁷⁵ It should also be noted that “administrative leave” is not the same as suspension.⁷⁶ The cleric on administrative leave remains “in good standing”; he is not the subject of a censure.⁷⁷

forthcoming. The accused, on the other hand, may very well prefer to have a definitive sentence rendered and executed resulting in a *res iudicata* which would protect him from the ‘double jeopardy’ of ever having to face the same charges again in a new trial. Hence, he can elect not to accept the renunciation which would then compel the tribunal to bring the case to conclusion with a decision presumably absolving the accused of the charges against him.” “Dismissal from the Clerical State: An Examination of the Penal Process,” in *StC*, 33 (1999), 203.

⁷⁵ BEAL observes that “it is not uncommon to find ‘administrative leave’ invoked to impose open-ended and potentially perpetual prohibitions to the exercise of orders, privation of office, and denials of ecclesiastical residence. In short, ‘administrative leave’ is sometimes being used as a camouflage for the imposition of perpetual expiatory penalties (c. 1366 § 1, 1°-3°) with no process whatsoever and with no possibility of recourse or appeal... The Church has the responsibility to find a permanent solution to ... difficult cases that comport more with justice and charity than a practice of barring clerics indefinitely from ministry under the cover of administrative leave.” “Administrative Leave: Canon 1722 Revisited,” 318.

In this same regard, J. Michael RITTY comments: “Keeping a priest’s ministry restricted indefinitely through a solely administrative matter is contrary to canon 1342. No indefinite penalty can be imposed without allowing a person the right to defend himself. The use of canon 381 and canon 223 § 3 as a way to keep troublesome priests out of ministry is inappropriate. This is a restriction of rights in order to impose a penalty that is not warranted.” “Balancing Rights of Accused Cleric and the Good of the Community,” in ESPELAGE (ed.), *CLSA Advisory Opinions, 2001-2005*, 104.

⁷⁶ MORRISEY distinguishes: “Regretfully, although the concepts of ‘administrative leave’ and ‘suspension’ are relatively close as to their effects, many priests confuse the two. Suspension, as we know, is a censure, and can be imposed only after a due warning has been give (cf. c. 1347). A priest who is suspended *a divinis* cannot celebrate the Eucharist, while a priest on administrative leave may do so privately unless other factors are present.” “Precept Imposing ‘Administrative Leave,’” 478. See also John CARR, *The Suspension of a Cleric by the Administrative Procedure According to the Code of Canon Law* (JCD thesis), Ottawa, Saint Paul University, 1989; Brendan DALY, “The Suspension of Priests: Procedures to Impose and Remove the Penalty,” in *The Canonist*, 9 (2018), 40-56.

⁷⁷ In the 1983 Code, suspension is a censure which can be imposed only on clerics (c. 1333). Like any censure, suspension can only be imposed after a prior warning for the offender to withdraw from contumacy (c. 1347 § 1) and its remission cannot be denied when the offender has withdrawn from contumacy (c. 1358 § 1). Some will note that diocesan policies are crafted as to constitute a “prior warning” to all the clergy. Nonetheless, even in this scenario, suspension cannot be imposed until, following a preliminary investigation, the fact of criminal misbehavior and imputability (see c. 1321 § 1) are determined either by a judicial or extrajudicial canonical process.

Gregory D. INGELS comments: “The use of canon 1722 does not constitute the imposition of a penalty. Hence, it would be inappropriate to remove or ‘suspend’ the accused priest’s

6.5 — The Right to an Advocate

The accused has a right to the assistance of an advocate and to a procurator.⁷⁸ The role of an *advocate* is to seek the truth on behalf of the person whom the advocate represents.⁷⁹ The role is not to exercise persuasion to arrive at a falsehood.⁸⁰ Canon 1723 requires that anyone defending himself or herself in a canonical penal process have the assistance of an approved advocate (see also c. 1481 §2). This is part of his natural right to defense.⁸¹ Canon 1481 §1 assures that every party in a trial “can freely appoint an advocate.” In a penal process, the judge must invite the accused to appoint an advocate within a set time limit. If the defendant fails to do this, the judge must appoint an advocate for the defendant who “will remain in this function as long as the accused does not appoint an advocate personally.”

The law allows a party to appoint several advocates (c. 1482 §3). The Code lists four qualifications of an advocate: eighteen years of age, a good reputation, Catholic (unless the diocesan bishop permits otherwise), and doctorate in canon law or otherwise enjoying true expertise (c. 1483). To perform the function, the advocate must be approved by the diocesan bishop (c. 1483). One without episcopal approval cannot serve as an advocate but could serve as a “canonical advisor” or as procurator to the accused. The diocesan bishop has discretion in an approving an advocate. One would presume that a diocesan bishop would

habitual faculties or to discontinue or severely limit his right to remuneration, as these actions would constitute the improper imposition of penalties in violation of canon 221 §3. Hence, during the course of this leave, the accused priest’s status as a priest in good standing must remain intact and his rights which are not directly affected by the use of canon 1722 must be provided for.” “Placing a Priest on ‘Administrative Leave’ During the Investigation of Alleged Misconduct,” in ESPELAGE (ed.), *CLSA Advisory Opinions, 2001-2005*, 472.

⁷⁸ See PONTIFICAL COUNCIL FOR LEGISLATIVE TEXTS, private response *Circa il diritto delle parti di designare il proprio Avvocato nelle cause giudiziarie*, prot. n. 15822/2017, 2 March 2017, at www.delegumtextibus.va/content/dam/testilegislativi/riposteparticulari/cic.

⁷⁹ See Patricia M. DUGAN, “Searching for Truth: Reflections of an Advocate,” in DUGAN (ed.), *Advocacy Vademecum*, 125-136; MORRISEY, “The Advocate for the Accused and the Right to Defense,” in *ibid.*, 3-19.

⁸⁰ See Diane L. BARR, “Trial Advocacy,” in *CLSA*, 69 (2007), 81-91; Frederick C. EASTON, “The Judge and the Advocate: Keeping the Boundaries,” in Victor G. D’SOUZA (ed.), *In the Service of Truth and Justice: Festschrift in Honour of Prof. Augustine Mendonça, Professor Emeritus*, Bangalore, St. Peter’s Pontifical Institute, 2008, 299-321; Klaus LÜDICKE et Ronny E. JENKINS, *Dignitas Connubii: Norms and Commentary*, Alexandria, CLSA, 2006, 180-183.

⁸¹ See Francis G. MORRISEY, “The Pastoral and Juridical Dimensions of Dismissal from the Clerical State and of Other Penalties for Acts of Sexual Misconduct,” 232; IDEM, “The Advocate for the Accused and the Right of Defense,” 5-19; Gregory D. INGELS, “Advocacy: Emerging Issues,” in *CLSA*, 58 (1996), 210-218.

need serious reason not to allow a person, otherwise qualified, to serve as advocate for the accused in a case pending before the diocesan bishop's tribunal. Nonetheless, the law gives to the diocesan bishop alone the discretion whether or not to admit a qualified person to serve as an advocate in his diocesan court.

Before beginning to function, the advocate must present an authentic mandate to the tribunal (c. 1484 § 1). In certain situations determined by the judge, an advocate may be required to take an oath of secrecy (c. 1455 § 3). An advocate can be removed from office (see cc. 1486-1487) and can be "punished" for certain inappropriate actions (e.g., resolving litigation by bribery, betraying the advocacy function for gifts, etc.: see cc. 1488-1489). Indeed, one role of the Supreme Tribunal of the Apostolic Signatura is to "discipline advocates or procurators if necessary" (c. 1445 § 3, 1°).

Advocates in a canonical process assist the accused by providing sound canonical direction and expertise in the search for objective truth. To achieve this end, *all* the details of the case must be presented to the advocate. In the search for objective truth, in addition to investigating whether the alleged delict occurred, the advocate will also research the imputability of the accused.

The Code specifically says that an advocate (but not the parties) can be present at the examination of witnesses unless the judge has decided otherwise (c. 1559), can present to the judge questions to be posed to the witnesses (c. 1561),⁸² and must be permitted to inspect the published acts of the case under pain of procedural nullity and to receive a copy of them upon request (c. 1598 § 1). Advocates themselves are incapable of being witnesses in the process (c. 1550 § 2, 2°).

Since the ordinary initiates the penal process and since the law requires that the accused have an advocate, whether appointed by the accused or designated by the judge *ex officio* (c. 1723 § 2), if the accused is unable to pay the advocate's fee, it follows that the ordinary would make financial provision. Since the accused did not seek the process and the law requires that he or she have an advocate, it may also seem to follow that the ordinary provide payment for the advocate even if the accused is simply unwilling to do so. Advocacy assistance in a penal process is a right assured by the law.⁸³

⁸² MORRISEY observes that one reason why the law does not allow the advocate direct cross-examination of witnesses is to assure that the truth surfaces in the process by means other than 'clever' arguments aimed more at 'winning' the case than at uncovering hidden truth: "The Advocate for the Accused and the Right of Defense," 16.

⁸³ Some may argue that since the accused in a penal trial "must always have" (*semper habere debet*) an advocate (c. 1481 § 2), proceeding without one may be a denial of defense, rendering the decision irremediably null (c. 1620, 7°). See John B. HESCH, "The Right of the Accused Person to an Advocate in a Penal Trial," in *Jur*, 52 (1992), 732-733.

6.6 — The Right to Appoint a Procurator

The Code permits parties in any contentious process to appoint a *procurator* (in addition to one or more advocates). Procurators stand in the place of a party in a trial; advocates present legal arguments on behalf of a party. Nothing prevents the same individual performing both roles as advocate and as procurator. Nothing prevents a person accused of canonical criminal activity from freely appointing a procurator.

The law provides specific norms concerning procurators. A party may have only one *active* or *functioning* procurator, who cannot substitute another without the express faculty to do so (c. 1482 § 1). Several procurators may be identified but designated in such a way that prevention is operative among them – i.e., if the first procurator ceases to function, the second immediately assumes the role, etc. (c. 1482 § 2). The only qualifications to be a procurator are to be eighteen years of age and to have a good reputation; procurators need not be approved for their function by the diocesan bishop (see c. 1483). The procurator must present an authentic mandate to the tribunal before undertaking the function, although to prevent the extinction of a right the judge can admit an advocate who does not yet have the requisite mandate (c. 1484). The procurator needs a *special* mandate to renounce an action, instance, or juridic act; to come to an agreement; to make a bargain; to enter arbitration; or in general to do those things which legally require a special mandate (c. 1485; see c. 1524 § 3). Procurators can be removed from their function in the same manner (cc. 1486-1487) and for the same reasons (cc. 1488-1489) as advocates. Also, as in the case of advocates, one role of the Supreme Tribunal of the Apostolic Signatura is to discipline procurators as needed (c. 1445 § 3, 1°).

Since a procurator takes the place of a party in a contentious process, what the law says about the party pertains also to the party's procurator. The Code specifically mentions that the procurator (but not the parties) can be present at the examination of witnesses unless the judge has decided otherwise (c. 1559), is to be identified by name in the sentence (c. 1612 § 1), and can receive the sentence on behalf of the party when it is published (c. 1615). Procurators, like advocates, are incapable of being witnesses in the process (c. 1550 § 2, 2°). Finally, even if the accused has appointed a procurator and/or an advocate, the party is “nevertheless always bound to be present at the trial according to the prescript of law or of the judge” (c. 1477).

6.7 — The Right to Timely Resolution of a Process

Another right of the accused during the canonical penal process is that the disputed matter be resolved in a timely fashion. Canon 1453 sets the time

period within which a judicial process should be completed. “Without prejudice to justice, judges and tribunals are to take care that all cases are completed as soon as possible and that in a tribunal of first instance they are not prolonged beyond a year and in a tribunal of second instance beyond six months.” Lengthy delay of a penal trial can further damage the good reputation of the accused and may even unbalance the common good of the Church, whose law expects speedy resolution of disputes.⁸⁴

Admittedly, a number of factors may contribute to a lengthier trial – particularly, the lack of sufficient personnel to handle a great number of cases or those of a certain kind (such as penal cases). Further, especially in cases involving civil crimes, ecclesiastical tribunals may find it more efficient to await the verdict of civil courts. Nonetheless, it would seem imperative that penal processes be resolved as expeditiously as possible and that suitable remedies be found to avoid lengthy delays. “Justice delayed is justice denied,” said British Prime Minister William E. Gladstone (1809-1898). “Periculum in mora,” said Livy.

6.8 — The Right to Refuse Renunciation of the Trial

The accused has no right to demand a penal process, nor to block its start.⁸⁵ Nonetheless, after the trial has begun, the accused has the right to pursue it to its end. The Code permits the promoter of justice, at the direction of the competent ordinary or with his permission, to “renounce the trial” at any grade (c. 1724 § 1).⁸⁶ Such renunciation could occur, for example, when the promoter envisions the impossibility of proving the delict, or when the innocence of the accused is apparent. Yet, the Code also states in canon 1724 § 2: “For validity the accused must accept the renunciation unless the accused was declared absent from the trial.” The accused must consent to this renunciation for *validity*, unless the accused had been declared absent

⁸⁴ See J. Michael RITTY, “Balancing Rights of Accused Cleric and the Good of the Community,” in ESPELAGE (ed.), *CLSA Advisory Opinions, 2001-2005*, 103.

⁸⁵ The recommendation that the accused would have the right to insist that a judicial penal process (rather than an extrajudicial penal process) be initiated was rejected by the *coetus De processibus* on 26 February 1980. *Comm*, 12 (1980), 191. Nonetheless, canon 1724 § 2 gives to the accused the *right* to demand that the judicial penal process continue.

⁸⁶ Raffaele COPPOLA comments: “Finally, it is appropriate to remember that the renunciation (*which does not refer to the acts of the case*) can be presented at any stage of the trial. Therefore, it can take place both in the first instance and in the court of appeal, either in the place of the consideration of the complaint of nullity against the sentence, or in the place of the consideration of the petition in order to effect a *restitutio in integrum*.” *Commentary on Canons 1721-1728, in Exegetical Comm*, vol. 4/2, 2026.

from the trial (see cc. 1592-1595). Indeed, the falsely accused defendant may insist that the trial continue to its completion so that the sentence will indicate in writing that he has not been found guilty of the false accusation. The judge is unable to reject the renunciation, provided that the participating defendant accepts the renunciation, in accord with canon 1724.⁸⁷

6.9 — The Right to Silence

Canon 1728 §2 gives the defendant in a judicial penal trial the right not to confess the delict, and the right not to have an oath administered. Before any interrogation of an accused person begins, these canonical rights should be explained clearly. The accused cannot be coerced, even under obedience, to admit to any delict or to make a statement under oath.⁸⁸ Nor can the accused be induced to waive his or her rights.⁸⁹ The tribunal must refrain from inferring his or her guilt from the accused exercising the prerogative to remain silent. At the same time, the accused can be “invited” to confess the delict,⁹⁰ but such an invitation must make it clear that the accused has no obligation to make such

⁸⁷ WOESTMAN, *Ecclesiastical Sanctions*, 178.

⁸⁸ Thomas J. GREEN observes: “This is a somewhat qualified canon 1531 §1 requiring parties legitimately questioned to tell the whole truth. While the accused may freely confess the delict, he or she should have access to counsel throughout the process and not be pressured into such a confession.” Commentary on Canon 1728, in CLSA Comm2, 1815.

⁸⁹ CLSA, *Revised Guide to the Implementation of the U.S. Bishop’s “Essential Norms for Diocesan/Eparchial Policies Dealing with Allegations of Sexual Abuse of Minors by Priests or Deacons”*, rev. ed., Washington, D.C., CLSA, 2004, 20.

⁹⁰ In his pastoral letter to the Catholics of Ireland, Pope BENEDICT XVI urged priests and religious who have abused minors to admit their guilt and to submit to the demands of justice.

You betrayed the trust that was placed in you by innocent young people and their parents, and you must answer for it before Almighty God and before properly constituted tribunals. You have forfeited the esteem of the people of Ireland and brought shame and dishonour upon your confreres. Those of you who are priests violated the sanctity of the sacrament of Holy Orders in which Christ makes himself present in us and in our actions. Together with the immense harm done to victims, great damage has been done to the Church and to the public perception of the priesthood and religious life.

I urge you to examine your conscience, take responsibility for the sins you have committed, and humbly express your sorrow. Sincere repentance opens the door to God’s forgiveness and the grace of true amendment. By offering prayers and penances for those you have wronged, you should seek to atone personally for your actions. Christ’s redeeming sacrifice has the power to forgive even the gravest of sins, and to bring forth good from even the most terrible evil. At the same time, God’s justice summons us to give an account of our actions and to conceal nothing. Openly acknowledge your guilt, submit yourselves to the demands of justice, but do not despair of God’s mercy.

Pastoral Letter of the Holy Father Pope Benedict XVI to the Catholics of Ireland, 19 March 2010, no. 7, in AAS, 102 (2010), 209-220.

a statement and that silence will certainly not infer his or her guilt. In the same way, the accused may be invited to make a statement under oath. This right to silence reflects the canonically-assured right to privacy (c. 220).

6.10 — The Right to Speak Last

The accused in a penal process has the right to be the last party to speak in addressing the alleged delict in the judicial process – i.e., the accused speaks after the promoter of justice makes final arguments concerning the allegation.

When all the acts of the case have been compiled, they are to be published in accord with canon 1589 § 1, which requires under pain of nullity that the proofs be shown to the parties (the judge may decide that a specific act not be shown to the accused, but this limitation must not be such as to compromise the accused's right to self-defense). Additional proofs may be introduced by either the promoter of justice or the accused (c. 1598 § 2; see c. 1600). Thereafter, the case is closed (c. 1599) and discussed (cc. 1601-1606).

Canon 1725 assures that the accused in a penal trial has the right to present his defense last in the procedural discussion of the accusation: "In the discussion of the case, whether done in written or oral form, the accused, either personally or through the advocate or procurator, always has the right to write or speak last." The accused defendant has the chance to respond to the accusation either by demonstrating that the alleged event never occurred or, if it did occur, that he or she acted without full imputability, in which case a lighter penalty may be imposed or a penance substituted for a penalty (c. 1324 § 1).

6.11 — The Right to Be Absolved of a False Accusation

The accused whose innocence is determined has the right to a judicial sentence absolving him or her of the false accusation. According to canon 1726, he or she enjoys this right at any grade and stage of the penal trial. "If at any grade and stage of the penal trial it is evidently established that the accused did not commit the delict, the judge must declare this in a sentence and absolve the accused even if it is also established that criminal action has been extinguished." Indeed, the accused enjoys this right even if the criminal action has been extinguished, which can happen through prescription (cc. 1362-1363), abatement (cc. 1520-1523), renunciation (cc. 1524-1525; 1724), and the execution of the definitive sentence (cc. 1650-1655). Thomas J. Green wisely reflects:

It is not enough simply to terminate the trial, for without such a formal declaration of innocence there might still be a continuing cloud over the reputation of the defendant. Such a declaration differs from a negative (*non*

constat) decision, which still could leave such a cloud since it may indicate simply that insufficient evidence of a delict has been introduced.⁹¹

6.12 — The Right to the Observance of Prescription

The accused has the right to expect the observance of the canonical norms on prescription in the application of any penalties. Prescription is the passing of time beyond which no penal sanction can be imposed on an offender (see cc. 197-199). More precisely, prescription extinguishes both a criminal action and an action to execute a penalty.⁹² Canon 197 says that canon law “receives prescription as it is in the civil legislation of the nation in question,

⁹¹ Thomas J. GREEN, Commentary on Canon 1726, in *CLSA Comm2*, 1814.

Charles J. SCICLUNA, in his remarks at the “Vatican Summit,” explained that the penal process results in one of three decisions about the accused. He remarked that sometimes the accused, even if not proven guilty, would perhaps not be returned to ministry so that the common good be protected.

A canonical penal process, whether judicial or administrative, ends with one of three possible outcomes: a *decisio condemnatoria* (where the *reus* is found guilty of a canonical delict); a *decisio dimissoria* (where the accusations have not been proven); or a *decisio absolutoria* (where the accused is declared innocent). A *decisio dimissoria* may create a dilemma. The bishop or religious superior may still be uncomfortable with reassigning the accused to ministry in a case where the allegations are credible but the case has not been proven. Expert advice is essential in these cases and the ordinary should use his authority to guarantee the common good and ensure the effective safeguarding of children and young people.

“Taking Responsibility for Processing Cases of Sexual Abuse Crisis and for Prevention of Abuse,” 21 February 2019, at www.pbc2019.org/fileadmin/userupload/presentations/21feb, 5. See also MORRISEY, “The Response of the Eastern Catholic Churches in North America to the Sexual Abuse Crisis,” 816.

⁹² Brian T. AUSTIN distinguishes the “statute of limitation” in U.S. civil law from “prescription” in canon law: “the canonical institute of prescription must be clearly distinguished from the civil law institute known in the U.S. as a ‘statute of limitation.’ While they bear a certain resemblance to one another, they cannot be simply equated. Specifically, they differ as to the *effect* they have upon a criminal action. In U.S. civil law, ‘A statute of limitation is regarded as barring, or running against, the *remedy* to which it applies, and *not as extinguishing*, or even impairing, the right, obligation, or cause of action’ [W. MACK and D.J. KISER (eds.), *Corpus Juris Secundum: A Complete Restatement of the Entire American Law as Developed by All Reported Cases*, Eagan, MN, Thomson/West, 1936, 36; emphasis added]. Therefore, after the time limit of a particular statute has expired, the ‘civil action itself continues and exists independently’” [C.G. RENATI, “Prescription and Derogation from Prescription in Sexual Abuse of Minor Cases,” in *Jur*, 67 (2007), 505] of that statute; the U.S. statute does not *extinguish* it. But this is precisely what the canonical institute of prescription does – it *extinguishes* the action, whether contentious (‘civil’) or criminal: ‘an action is extinguished [*extinguitur*] by prescription’ (c. 1492 §1); ‘a criminal action is extinguished [*extinguitur*] by prescription’ (c. 1362 §1). That is to say, “when the time period of prescription has run and

without prejudice to the exceptions which are established in the canons of this Code.” Exceptions to secular legal prescription exist in the Code for the prosecution of ecclesiastical delicts. According to canon 1362 § 1, criminal action is limited by a prescription period of three years, unless a longer period is assigned as in the following cases:

- 1° delicts reserved to the Congregation for the Doctrine of the Faith [which have a prescription period of twenty years];⁹³
- 2° an action arising from the delicts mentioned in cann. 1394, 1395,⁹⁴ 1397, and 1398, which have a prescription of five years;
- 3° delicts which are not punished in the common law if particular law has established another period for prescription.

Moreover, the prescription period for the *delictum gravius* of sexual abuse of a minor by a cleric, reserved to the Congregation for the Doctrine of the Faith, is identified in its *Normae de gravioribus delictis*.

Article 7 – § 1. A criminal action for delicts reserved to the Congregation for the Doctrine of the Faith is extinguished by prescription after twenty

reached its terminus, the very cause of action itself is extinguished. It no longer exists’ [ibid., 506].” “Due Process of Law and the USCCB Essential Norms,” in *Jur*, 51 (2017), 70-71.

See also Philip BROWN, “Prescription and Statutes of Limitation,” in *CLSAP*, 70 (2008), 383-451; IDEM, “Prescription and the Usefulness of Time,” in MARTENS (ed.), *A Service Beyond All Recompense*, 205-233; Ariel David BUSO, “La prescripción extintiva y la dispensa de la prescripción en el derecho penal canónico,” in *Anuario argentino de derecho canónico*, 22 (2016), 121-145; Davide CITO, “Prescription in Penal Matters,” in DUGAN (ed.), *The Penal Process*, 183-201; Brendan DALY, “Prescription: A Major Issue in Dealing with Sexual Abuse Cases,” in *The Canonist*, 10 (2019), 72-86; Joaquín LLOBELL, “Sull’interruzione e sulla sospensione della prescrizione dell’azione penale,” in *IE*, 25 (2013), 641-661; Valère NKOUAYA MBANDJI, *La prescription canonique des délits sexuels sur des personnes mineures*, Paris, Éditions Lethielleux, 2018; IDEM, “The Sexual Abuse of Minors Committed by Members of the Church from the Perspective of International Criminal Law,” in *SCL*, 14 (2019), 201-226; Sara PAGLIALUNGA, “La prescrizione nel diritto penale canonico,” in *Per*, 107 (2018), 327-357; Josée Luis SÁNCHEZ-GIRÓN RENEDO, “Algunos interrogantes en la disciplina codicial sobre la prescripción de la acción criminal,” in KOWAL and LLOBELL (eds.), *“Iustitia et iudicium”*, vol. 4, 2167-2185.

⁹³ CDF, *Normae* 2010, article 7 states: “1. A criminal action for delicts reserved to the Congregation for the Doctrine of the Faith is extinguished by prescription after twenty years, with due regard to the right of the Congregation for the Doctrine of the Faith to derogate from prescription in individual cases. 2. Prescription runs according to the norm of canon 1362 § 2 of the Code of Canon Law, and canon 1152 § 3 of the Code of Canons of the Eastern Churches. However, in the delict mentioned in art. 6 § 1, n. 1, prescription begins to run from the day on which a minor completes his eighteenth year of age.”

⁹⁴ The delict of canon 1395 § 2 of sexual abuse of a minor by a cleric is a “more grave delict” reserved to the Congregation for the Doctrine of the Faith. According to CDF, *Normae* 2010, it has a prescription period of twenty years, counted from the eighteenth birthday of the victim.

years, with due regard to the right of the Congregation for the Doctrine of the Faith to derogate from prescription in individual cases.⁹⁵

§ 2. Prescription runs according to the norm of canon 1362 § 2 of the Code of Canon Law and canon 1152 § 3 of the Code of Canons of the Eastern Churches. However, in the delict mentioned in art. 6 § 1, 1° [= the delict against the sixth commandment of the Decalogue committed by a cleric with a minor under the age of eighteen years; equal to a minor is a person who habitually „has the imperfect use of reason], prescription begins to run from the day on which a minor completes his eighteenth year of age.⁹⁶

The prescription period precedes the first strictly penal procedural act placed against the accused *after the preliminary investigation*.⁹⁷ The prescription period to execute the judicial sentence is the same length as the period to prosecute a criminal action.⁹⁸

6.13 — The Right Not to Be Penalized Except according to Law

Book VI of the Code of Canon Law contains various kinds of penalties. Some are *facultative* (meaning that the superior has discretion in applying them or not) and others are *perceptive* (meaning that the superior is expected to apply them). Some penalties are incurred *latae sententiae* (meaning they are incurred *ipso facto* by the very committing of the delict) and others are *ferendae sententiae* (meaning they must be imposed through a penal process, judicial or extrajudicial).

Those who commit a delict have the right to have penalties imposed in accord with the law.⁹⁹ Currently, the penalty for sexual abuse of a minor or vulnerable person by a cleric or member of an institute or consecrated life or society of apostolic life is a just penalty, not excluding dismissal from the clerical state or the institute/society (c. 1395 § 2, 695 § 1). Indeed, the penalty imposed is to be proportionate to the offense which has been committed, as

⁹⁵ Canon 9 says, “Laws regard the future, not the past, unless they expressly provide for the past.” By permitting the Congregation for the Doctrine of the Faith to derogate from the time limits of prescription, Pope JOHN PAUL II was obviously aware of the grave evil of sexual abuse of a minor which occasions a derogation from prescription.

⁹⁶ CDF, *Normae de gravioribus delictis*, art. 7.

⁹⁷ CITO, “Prescription in Penal Matters,” 194 observes: “This means that the prior investigation and all the pretrial actions indicated in canons 1717-1718 do not prevent the operation of the prescription if the libellus is introduced with the indicated time already passed for the extinction of the action.”

⁹⁸ Ibid., 197. See also Velasio DE PAOLIS, *De sanctionibus in Ecclesia: Adnotationes in codicem: Liber VI*, Rome, Editrice Pontificia Università Gregoriana, 1986, 108-109.

⁹⁹ See MORRISEY, “Penal Law in the Church Today: Recent Jurisprudence and Instructions,” 52.

Pope John Paul II explained to the *plenarium* of the Congregation for the Doctrine of the Faith as he addressed *graviora delicta* cases.

Finally, I would like to mention a sensitive and timely matter. In the past two years your Congregation has witnessed a considerable increase in the number of disciplinary cases referred to it because of the competence the Dicastery possesses in *ratione materiae* on *delicta graviora*, including the *delicta contra mores*. The body of canonical norms that your Dicastery is called to apply with justice and equity strives to guarantee both the exercise of the right of defence of the accused and the demands of the common good. Once the offence has been proven, it is necessary in each case to assess carefully both the just principle of proportionality between fault and punishment, as well as the predominant need to protect the entire People of God.¹⁰⁰

6.14 — The Right to a Decision Reached with Moral Certitude

Canon law requires that a judgment about the accused's guilt must be reached with moral certitude.¹⁰¹ If a judge cannot arrive at moral certitude, the judge is to pronounce that the allegation is not established and is to dismiss the accused as absolved (cf. c. 1608 §4). Pope Pius XII said: "If it is impossible to establish the necessary guilt with moral certainty, it is necessary to observe the principle: *in dubio standum est pro reo*."¹⁰² Angelo G. Urru comments: "The *praesumptio* must always be in favor of the innocence of the

¹⁰⁰ Pope JOHN PAUL II, Allocation to the *Plenarium* of the Congregation for the Doctrine of the Faith, 6 February 2004, at www.vatican.va.

Notwithstanding his insistence to a penalty proportionate to the delict, two years earlier, the same Bishop of Rome said to the cardinals of the United States that sexual abusers of minors have no place in the priesthood or religious life.

The abuse of the young is a grave symptom of a crisis affecting not only the Church but society as a whole. It is a deep-seated crisis of sexual morality, even of human relationships, and its prime victims are the family and the young. In addressing the problem of abuse with clarity and determination, the Church will help society to understand and deal with the crisis in its midst.

It must be absolutely clear to the Catholic faithful, and to the wider community, that Bishops and superiors are concerned, above all else, with the spiritual good of souls. People need to know that there is no place in the priesthood and religious life for those who would harm the young.

Allocation to the Cardinals of the United States, 23 April 2002, at www.vatican.va/resources/Americancardinals2002.

¹⁰¹ Pope JOHN PAUL II said that when moral certitude is required to reach a decision (in matrimonial matters), "probability alone is not enough to decide a case." Allocation to the Roman Rota, 4 February 1980, in AAS, 72 (1980), 172-178; English translation in WOESTMAN (ed.), *Papal Allocutions to the Roman Rota, 1939-2002*, 159-164 (n. 6). The same is true in penal cases.

¹⁰² Pope PIUS XII, "Allocutio iis qui interfuerunt VI conventui internationali de jure poenali," 3 October 1953, in AAS, 45 (1953), 737.

accused, even if the accuser appears to be trustworthy or [the accusation] is presented by persons of unquestionable moral authority.”¹⁰³

6.15 — The Right to Appeal or Recourse with Suspensive Effect

Canon 1353 states: “An appeal or recourse from judicial sentences or from decrees, which impose or declare a penalty, has a suspensive effect.” The appeal against a sentence issued during the penal judicial process can be made by the accused (c. 1727 § 1) or by the promoter of justice (c. 1728 § 2).¹⁰⁴ The recourse against an extrajudicial decree can be made by the accused. Both appeal and recourse have “suspensive effect,” which means that the sentence or decree cannot be executed until the process of the appeal or recourse is finished. It follows that any existing restrictions of canon 1722 (on “administrative leave”) continue, since they “end by the law itself when the penal process ceases.”

6.16 — The Right to Decent Support and Remuneration

The Code states specifically that clerics have a right both to decent support (*honesta sustentatio*) and to remuneration (*remuneratio*).¹⁰⁵ Canon 384 says the diocesan bishop has the responsibility “to take care that provision is made for [presbyters’] decent support (*sustentatio*) and social assistance, according to the norm of law.”¹⁰⁶

¹⁰³ URRU, “Considerations on Imposing Penalties in Specific Cases,” 294.

¹⁰⁴ Tiziano VANZETTO, “L’appello da parte del promotore di giustizia nella cause penali (can. 1727 § 2),” in *QDE*, 30 (2017), 68-74.

¹⁰⁵ *CCEO* canon 390 § 1 mentions in a single canon both *sustentatio* and *remuneratio*. “Clerics have the right to suitable support [*congrua sustentatio*] and to receive a just remuneration [*iusta remuneratio*] for carrying out the office [*officium*] or function [*munus*] committed to them...”

¹⁰⁶ Among the various authors speaking of a cleric’s right to remuneration and benefits, see in particular Velasio DE PAOLIS, “Maintenance of the Clergy: From the Council to the Code,” in René LATOURELLE (ed.), *Vatican II: Assessment and Perspectives*, 3 vols., New York, Paulist Press, 1988-1989, vol. 1, 668-697; Georges DOLE, “L’assicurazione dei chierici nel diritto comparato,” in *ME*, 109 (1984), 196-220; Daniel FALTIN, “De retributione et praevidentia sociali presbyterorum iuxta doctrinam Concilii Vaticani II,” in *Ap*, 46 (1973), 366-393; Jeffrey KING, *The Application of Canon 1350 on Decent Support of the Clergy to Contemporary North American Situations* (JCL thesis), Washington, The Catholic University of America, 2004; Germain LESAGE, “Régime et péréquation pour le clergé diocésain,” in *StC*, 3 (1969), 173-208; Tino MARCHI, “La remunerazione dei chierici nel nuovo codice,” in *Lo stato giuridico dei ministri sacri nel codice di diritto canonico*, Atti del XV Congresso Canonistico Pastorale, Vatican City, Libreria editrice Vaticana, 1984, 187-195.

Clerics have a right to decent support even when they are not exercising ecclesiastical ministry. The Code addresses both the *remuneratio* and the other provisions of clerics (when they suffer illness, incapacity, or old age).¹⁰⁷

Canon 281 – § 1. When clerics dedicate themselves to ecclesiastical ministry, they deserve remuneration which is consistent with their condition, taking into account the nature of their function and the conditions of places and times, and by which they can provide for the necessities of their life as well as for the equitable payment of those whose services they need.

§ 2. Provision must also be made so that they possess that social assistance which provides for their needs suitably if they suffer from illness, incapacity, or old age.¹⁰⁸

Canon 1274 § 1 says that each diocese may have a special institute to give support (*sustentatio*) to clergy who offer service in the diocese: “Each diocese is to have a special institute which is to collect goods or offerings for the purpose of providing, according to the norm of canon 281, for the support of clerics who offer service for the benefit of the diocese, unless provision is made for them in another way.”¹⁰⁹ No diocesan bishop may incardinate a cleric unless his particular church is able to provide for the “decent support” (*honestia sustentatio*) of the cleric (c. 269, 1°).¹¹⁰ Moreover, canon 1350 § 1 explains that a cleric’s right to decent sustenance continues as long as he is not dismissed from the clerical state, even if he is subject to another penalty: “Unless it concerns dismissal from the clerical state, when penalties are imposed on a cleric, provision must always be made so that he does not lack

¹⁰⁷ This canon does not employ the term “right” (*ius*), as do some of the other canons in this section of the Code on “The Obligations and Rights of Clerics” (cc. 273-289); yet, inasmuch as canon 281 is listed in this section, it follows that the canon identifies a clerical right. (See c. 17, directing that the meaning of ecclesiastical laws be considered “in their text and context.”) The 1981 *Relatio* mentions that Francis Cardinal König had suggested that the canon specifically state that clergy enjoy the right to remuneration (“*iure gaudent*”), but that the secretariat replied that the canon is adequate without such specific mention of the *ius*; it said that the right is sufficiently stated and the wording of the proposed canon avoids placing the ministerial priesthood in some less appropriate economic context. PONTIFICAL COMMISSION FOR THE REVISION OF THE CODE OF CANON LAW, *Relatio*, Vatican City, Typis polyglottis Vaticanis, 1981, 67. Clearly, those in the clerical state have a *right* to remuneration.

¹⁰⁸ Canon 281 § 3 concerns the remuneration for married deacons, which is beyond the scope of this study.

¹⁰⁹ Canon 1303 § 2 requires that the goods of a non-autonomous foundation which have been entrusted to a public juridic person subject to the diocesan bishop “must be remanded to the institute mentioned in canon 1274 § 1 when the time [of the duration of the non-autonomous foundation] is completed unless some other intention of the founder has been expressly manifested.”

¹¹⁰ PONTIFICAL COUNCIL FOR LEGISLATIVE TEXTS, *Decretum de recurso super congruentia inter legem particularem et normam codicalem*, 29 April 2000, in *Comm*, 32 (2000), 163-164.

those things necessary for his decent support.”¹¹¹ Further, canon 1350 §2 adds: “In the best manner possible, however, the ordinary is to take care to provide for a person dismissed from the clerical state who is truly in need because of the penalty.”

The exact amount of financial support and benefits given to presbyters of various categories may vary. It is important to assure that even the minimum support is “decent” support. “In order to avoid serious misunderstandings, it would be important, it seems, for a diocese to have a policy prepared beforehand, determining what type of assistance would be given to a priest” in various circumstances.¹¹² Absent such a general policy, it seems that all presbyters have the right to the same benefits.

Conclusion

The Church recognizes and identifies the rights of victims/survivors of sexual abuse. It also recognizes the rights of those who are accused of committing these harmful acts. The rights of victims/survivors and the rights of the accused are not mutually exclusive: they exist simultaneously. This study has focused on the identification in the Catholic Church of the rights belonging to a person accused of sexual abuse of minors and vulnerable persons. When these rights are respected, protected, and exercised, it is expected that the truth of this allegation will be revealed.

If it is discovered that the accused has been falsely accused, he or she must expect competent ecclesiastical officials to bestow the full restoration of his or her reputation and status within the Church. The falsely accused has this right. If the accused is found to have committed the offense of sexual abuse, he or she should expect to be punished for the delict. Pope Francis has more than once insisted on “zero tolerance” for sexual abuse which, one could reasonably argue, includes the removal of the offender from his or her ecclesiastical status. Any punishment of the offender must include reform measures, because one of the three objectives of ecclesiastical penal law is “to reform the offender” (c. 1341). This reforming objective reflects that the supreme law of the Church is the *salus animarum* (c. 1752).

¹¹¹ One observes that canon 1350 §1 uses *sustentatio* (as does c. 1274 §1), not *remuneratio*.

¹¹² See MORRISEY, “The Pastoral and Juridical Dimensions of Dismissal from the Clerical State and of Other Penalties for Acts of Sexual Misconduct,” 233; Gregory D. INGELS, “Right of Unassignable Priest to Remuneration,” in Arthur J. ESPELAGE (ed.), *CLSA Advisory Opinions, 1994-2000*, Washington, CLSA, 2002, 95; James-Daniel FLYNN, “Canon 1305 §1: Obligation to Provide Support to Suspended Priest,” in *RR 2008*, 126.

Appendix

Publishing Names of Offenders on Diocesan Websites

Reply of Pontifical Council for Legislative Texts¹¹³

Prot. N. _____
Vatican City State
15 September 2016

Your Excellency,

With these presents I respond to your letter N. _____ of 10 June of this year, in which you requested the opinion of this Pontifical Council regarding the publication on the webpage of the _____ Conference of a list containing the names of clerics condemned in a civil or ecclesiastical process due to abuse of minors.

After an attentive examination of the question, I hasten to communicate to you the following observations.

Canon 220 establishes a principle of general character responding to the natural law and to the imperative that prohibits detraction and defamation (cfr. CCC 2477-2479): detraction concerns the dissemination of true information, even when such is public, if done in an unjustifiable manner. The aforesaid canon declares that “no one is permitted to harm illegitimately the good reputation which a person possesses.” This means that sometimes injury to reputation can be legitimate by reason of the superior good of persons or communities. A concrete example of legitimate injury to the reputation of an offender is represented in the “Declaration” on the part of the Ordinary of a penalty incurred *latae sententiae* (canon 1335 CIC) in order to prevent the offender from inflicting ulterior harm to the community.

During the drafting of study of the Fundamental Law of the Church, injury to reputation was considered legitimate in the case of removal of a pastor or in the case of the declaration of a heretic (PCCICR, LEF, *Coetus Specialis studii*, Sessio VII, 17-22 December 1973, p. 40, canon 20).

The judgment of adequacy between the good that good reputation represents, and the evil that an offender can inflict upon a community is made, necessarily, case by case, and, consequently, the legitimacy of rendering the status of an offender public cannot be set forth in general terms. In some cases it will be legitimate, because there is a reasonable risk to other persons, while said publicity would not be legitimate when the risk were reasonably to be excluded. This latter [case] is to be observed, entirely, in the case of deceased delinquents: in these cases there cannot be a proportionate reason for injury to reputation.

Furthermore, a judgment of this kind corresponds to the Pastor who has care of the community or who is responsible for the offender. Consequently, other levels of

¹¹³ PONTIFICAL COUNCIL FOR LEGISLATIVE TEXTS, Private response, 15 September 2016, in *RR 2017*, 7-9 (unofficial English translation); 5-7 (original Italian).

authorities – for example, the episcopal conference – can act subsequent to the deliberation of the competent authority.

In this sense, the basing of the publication of information [pertaining to an offender] upon reasons of transparency or reparation (unless the same subject consents) does not appear to be legitimate, because such a publication would in fact contradict canon 220 *CIC*.

In support of what is stated above, some characteristics of penal canonical discipline that point to confidentiality and the protection of good reputation are to be called to mind: the accused is neither held to take an oath, nor to confess his own crimes (canon 1728 §2 *CIC*); all those who are involved in a penal trial are forever bound by the obligation of secrecy, something which does not always occur in other trials (canon 1455 *CIC*); the remission of a penalty is not divulged, in order to protect the good reputation of the offender (canon 1361 §3 *CIC*): which, a fortiori, suggests the need for confidentiality regarding the imposition of a penalty.

Naturally, in the case in which legislation of a Country legitimately establishes concrete norms in this matter, the observations [given supra] should be reexamined in light of legislation.

In the hope of having provided a useful opinion, I take the occasion to confirm myself with sentiments of distinct respect, of Your Most Reverend Excellency, most devotedly in the Lord,

+ Francesco Card. Coccopalmerio, President; + Juan Ignacio Arrieta, Secretary

THE PROCEDURE FOR ADMINISTRATIVE RECOURSE

A COMPARATIVE STUDY OF THE LATIN AND EASTERN CODES

AURIMAS RUDINSKAS

SUMMARY — The study compares the canons on administrative recourse in the Latin and Eastern Codes and finds them the same or similar in most respects, but there are some key differences. The Eastern law obliges the hierarchical superior to render a decision on the recourse within sixty days; this is not found in the Latin law. In the Latin Code, the higher authority may amend, modify, or replace the lower authority's decree in deciding the recourse, but the Eastern legislation allows this only if permitted by the particular law of the Church *sui iuris*. Another difference is that the *CIC* allows the conference of bishops or, if the conference has not acted, the diocesan bishop to set up a special agency that could help the parties seek an equitable solution to the dispute; this provision not mentioned in the *CCEO*. The A. concludes with some critical observations on the norms for administrative recourse.

RÉSUMÉ — L'étude compare les canons sur le recours administratif dans les Codes latin et oriental, les trouvant, dans l'ensemble, pareils ou semblables; mais il y a quand même des différences importantes. Le droit oriental oblige le supérieur hiérarchique à rendre une décision sur le recours dans les soixante jours, ce qui ne se retrouve pas dans le droit latin. Dans le Code latin, l'autorité supérieure peut amender, modifier ou remplacer le décret de l'autorité inférieure en décidant du recours, ce que la législation orientale ne permet que si le droit particulier de l'Église *sui iuris* le prévoit. Une autre différence se situe dans le fait que le *CIC* admet que la conférence des évêques ou, si la conférence n'a pas agi, l'évêque diocésain, décide que soit constituée une agence spéciale qui puisse aider les parties à en arriver à une solution au conflit qui soit équitable; cette provision n'est pas mentionnée dans le *CCEO*. L'A. conclut avec quelques observations critiques sur les normes pour le recours administratif.

Introduction

The canonical procedure for recourse against an administrative act serves to protect the subjective rights of the faithful by means of a formal review of the legitimacy of the act.¹ Singular administrative acts can be deficient in three ways. First, they can be both unfair and illegal (illicit or even invalid) when the authority placing an act notably fails to observe a pertinent law or a contract/agreement. Furthermore, the authority may act beyond his competence or use unsound and personal reasons in grounding the act, which makes it unfair and illegal. Second, singular administrative acts can be deficient when considered from the perspective of equity. In such cases, the authority is competent to issue the act, follows the required law, and bases the act on good reasons, but the act is unfair because of the violation of some subjective right of the person for whom it is being issued. Finally, the act can be valid and fair but imprudent, unwise and, thus, in some way, harmful to the person.² A person who feels aggrieved by such an act has the right to take recourse against it.

The first part of this study compares the canons on hierarchical recourse in the Latin and Eastern Codes. This is followed by some critical observations on these norms. Comparative studies on the two Codes owe their original inspiration to the Synod of Bishops held in Rome on 25 October 1990, when the Roman Pontiff stated that the *CCEO* conjointly with the *CIC* and the apostolic constitution *Pastor bonus* must be considered as intrinsic parts of one body of canon law. Believing that the knowledge of this *unus Corpus Iuris Canonici* will greatly benefit the universal Church, the Pope stressed the necessity of comparing Eastern and Latin legislation and invited faculties of canon law worldwide to take on this task.³ The need for comparative studies of both Codes was emphasized again by the Legislator at an international symposium held in Vatican City in 1993⁴ as well as in the 2002 Decree *Sapientia christiana*, issued by the Congregation for Catholic Education. These directives of the Holy Father and the Congregation are the motivation for the comparative approach taken in this study.

¹ See Valasio DE PAOLIS, "Administrative Recourses and Recourses within Religious Institutes," in *Consecrated Life*, 18, no. 1 (1993), 93.

² See Thomas E. MOLLOY, "Administrative Recourse in the Revised Code of Canon Law," in *CLSAP*, 44 (1983), 263.

³ See *AAS*, 83 (1991), 490.

⁴ See *Comm*, 25 (1993), 13-14.

1 — *Administrative Recourse in the CIC and CCEO*

This first part of the study treats twelve areas of administrative law in the two Codes. These are: (1) the extent of administrative recourse; (2) amiable settlement of a dispute; (3) the petition for revocation or emendation of a decree; (4) an exception to the requirement to a request for reconsideration; (5) outcomes of the request for reconsideration; (6) suspension of the decree; (7) reasons and time limits for submitting recourse; (8) time limits for higher authority to render a decision; (9) the protection of rights; (10) norms for superior authority; (11) reparation of damages; and (12) special norms for recourses against patriarchs.

1.1 — The Extent of Administrative Recourse

CIC c. 1732 / CCEO c. 996

The first difference between *CIC* c. 1732 and *CCEO* c. 996 regards the structure of the Codes. The *CIC* uses the word “section” because the Code is divided into books, parts, sections, titles, chapters, articles and canons.⁵ On the contrary, the *CCEO* is divided into chapters, titles, articles and canons; thus, it uses “title.”⁶

Both canons imply that the scope of administrative recourse is limited to singular administrative decrees, in other words, to the administrative acts that are issued for either a single physical or juridic person, or for a few individuals.⁷

⁵ Draft c. 1 § 1 of the 1972 Latin *Schema* does not mention *section* but refers to *what is established by this law*. The reference to *section* appeared in the 1980 Latin *Schema*, draft c. 1688. This and other references to the Latin *schemata* are taken from E.N. PETERS, *Incrementa in progressu 1983 Codicis Iuris Canonici*, Gratianus Series, Montréal, Wilson & Lafleur, 2005.

⁶ In the Preface to the Latin Edition of the *Code of Canons of the Eastern Churches*, it is said that Pius XI, who started the codification process of Eastern canon law, expressly decreed on 8 February 1937 that the future Code should be organized into *titles*. Nevertheless, in draft c. 369 of the 1982 Eastern *Schema*, the codification fathers talked at first about *section*, not *title*. Only in draft c. 991 of the 1986 Eastern *Schema* was the word *section* replaced with *title*. (*Nuntia*, 14 [1982], 99, sub “Can. 369.” See also *Nuntia*, 24-25 (1987), 178, sub “Can. 991.”) For the reasoning behind the change, see John D. FARIS, “Historical Introduction,” in George NEDUNGATT (ed.), *A Guide to the Eastern Code: A Commentary on the Code of Canons of the Eastern Churches*, Kanonika 10, Rome, Pontificio Instituto Orientale, 2002, 50 (= NEDUNGATT [ed.], *A Guide to the Eastern Code*).

⁷ Draft c. 1 § 1 of the 1972 Latin *Schema* expressly named some types of administrative acts, such as decrees, rescripts, precepts, dispensations, and permissions but, in the 1980 *Schema*, they were generalized as *singular administrative acts*. The *schemata* of *CCEO* c. 996 always used the general term.

Unlike general administrative decrees, which are directed to the whole community, these acts have a singular application.⁸ Since singular administrative acts can be given in the internal and external forums, *CIC* c. 1732 and *CCEO* c. 996 specify that only acts issued in the external forum are subject to administrative recourse. Since singular administrative acts are acts of executive power (*CIC* c. 35 and *CCEO* c. 1510 § 1), both legislations expressly exclude judicial acts from the scope of recourse.⁹ Legislative acts, even though not mentioned in these canons, are excluded for the same reason.¹⁰ Taking into consideration that *CIC* c. 1404 and *CCEO* c. 1058 declare that the Roman Pontiff is judged by no one, it is logical that *CIC* c. 1732 and *CCEO* c. 996 state that singular administrative acts of the Roman Pontiff are not subject to recourse.¹¹ To this are added singular administrative acts of the Roman Curia that have been approved in *forma specifica* by the Pope¹², as well as singular administrative acts of the Secretariat of State.¹³ Likewise, the recourse procedure of both Codes cannot be employed in challenging the decrees of the Supreme Tribunal of the Apostolic Signatura (*CIC* c. 1629, 1° and *CCEO* c. 45 § 3).

Canon 337 of the *CIC* and c. 50 of the *CCEO* state that the College of Bishops exercises its supreme and full power over the universal Church, in communion with the Head of the College, through an ecumenical council. Acting together with the Roman Pontiff, the College of Bishops is the highest authority in the Church. Thus, c. 1732 of the *CIC* and c. 996 of the *CCEO*

⁸ The major difference between draft c. 1 § 1 of the 1972 Latin *Schema* and its final version, *CIC* c. 1732, is that the *Coetus de processu administrativo* initially intended the scope of administrative recourse to be much broader. The recourse procedure had to be applied not only to singular acts but generally to all administrative acts. The schema mentioned acts given to single persons as well as communities. However, this intention was abandoned, and the 1980 Latin *Schema*, draft c. 1688, limited itself to singular administrative acts and expressly mentioned the external forum. The Eastern *Coetus de processibus*, right from the beginning in the 1982 *Schema*, applied the procedure only to individual administrative acts in the external forum. See also *Nuntia*, 14 (1982), 99, sub “Can. 369.”

⁹ Administrative acts issued in the context of a judicial process also are not subject to administrative recourse.

¹⁰ Although laws and their equivalents are not subject to recourse, their application in particular cases by administrative decrees is liable to challenge.

¹¹ An attempted recourse to the College of Bishops or an ecumenical council against the singular administrative acts of the Pope is criminalized in *CIC* c. 1372. The Eastern Code simply forbids such an attempt (*CCEO* c. 49 § 3).

¹² See Michel THÉRIAULT, “La procédure des recours administratifs: survol et évaluation,” in *CLSAP*, 57 (1995), 389.

¹³ Article 39 of *Pastor bonus* states that the Secretariat of State provides close assistance to the Roman Pontiff; therefore, its acts are considered to be pontifical. The express mandate to represent the Pope in civil matters was given to the Cardinal Secretary by a Chirograph Letter on 6 April 6 1984. See *AAS*, 76 (1984), 495-496.

exclude singular administrative acts issued by an ecumenical council from the scope of administrative recourse. The recourse against such acts is impossible for the reason of not having superior hierarchic authority.

Defining the author of the decree, *CCEO* c. 996 refers to him as “any legitimate power in the Church.”¹⁴ *CIC* c. 1732 does not mention the author; however, he is implicitly indicated. It is the authority that has the power to issue singular administrative acts, among which there is a singular administrative decree; in other words, it is the executive authority. In the particular Church, the executive authority is the diocesan bishop, his general and episcopal vicars, as well as his delegates. All of them exercise executive power of governance within the area of their competence; therefore, their singular administrative decrees can be subject to administrative recourse. According to the commentators of the 1917 Code, in spite of the fact that a parish priest had held an ecclesiastical office, he did not possess the power of governance in the public forum.¹⁵ This viewpoint has changed after the revision of the Code. Canon 519 of the *CIC* and c. 281 § 1 of the *CCEO* now state that a parish priest shares in the ministry of the diocesan bishop and fulfills not only the function of teaching and sanctifying but also of governing; that is to say, his office has the share in the power of governance overseen by the diocesan bishop. He acts as an executive authority. Thus, his administrative acts can be challenged by administrative recourse.¹⁶

Regarding those who have not been instituted in a sacred order, *CIC* c. 129 § 2 and *CCEO* c. 979 § 2 state that lay members of the Christian faithful can

¹⁴ None of the Eastern *schemata* (1982, c. 369; 1985, c. 369; 1986, c. 991) made express reference to the author of the decree. The first mention of it is found in the proposed editorial amendments to the 1986 *CICO Schema*, sent by the *Coetus de coordinatione* to members of the Commission by letter dated 16 July 1988 in preparation for the Plenary Assembly, where the author of the decree is referred to as *ex quavis potestate publica in Ecclesia*; this wording was changed to *ex quavis legitima potestate in Ecclesia* in the *ultime modifiche* made in the final “Session *coram Sanctissimo*” before the promulgation of the text as *CCEO* c. 996. See *Nuntia*, 27 (1988), 61, *sub* “Can. 991.” See also *Nuntia*, 31 (1990), 43, *sub* “Can. 996 (991).” All translations in this study are mine.

¹⁵ See John P. BEAL, “Hierarchical Recourse: Procedure at the Local Level,” in *CLSAP*, 62 (2000), 95 (= BEAL, “Hierarchical Recourse: Procedure at the Local Level”).

¹⁶ According to Michael R. MOODIE, “the pastor not only governs the particular community assigned to him but also acts as the representative of the juridic person (c. 532). In the former capacity, he acts with executive authority; in the latter, he represents the parish as a corporate entity. Jurisdiction over conflicts arising from the pastor’s activities would depend upon the role played. Suits against the parish would go before the ordinary tribunal while actions against the pastor’s governance as officeholder would be subject to hierarchical recourse alone” (MOODIE, “The Administrator and the Law: Authority and Its Exercise in the Code,” in *Jur*, 46 [1986], 61).

cooperate in the exercise of the power of governance; in other words, those lay members of the Church who are working in a parish or a diocesan curia as staff members, even if not holding an ecclesiastical office, *cooperate in the exercise* of the power of governance possessed by the parish priest or the diocesan bishop. Still, to correctly understand this cooperation, a distinction must be kept in mind between the power of governance of divine law and the power of governance of merely ecclesiastical law. According to John Huels, “while only priests can lead a Christian community in virtue of the divine law powers of order and governance, deacons and lay persons may share in the exercise of merely ecclesiastical power.”¹⁷ This cooperation in the exercise of the power of governance of the merely ecclesiastical law can result in decisions made by lay members of the parochial or diocesan staff that are subject to administrative recourse.¹⁸ In the draft c. 369 of the 1982 Eastern *Schema*, the *Coetus de processibus* considered it necessary to specify that subject to the procedure of recourse are singular administrative acts that *effectum iuridicum pariunt*, that is to say, bear a juridic effect; however, the *Coetus de coordinatione* proposed to the members of the Commission to take the phrase out of the 1986 *Schema*.¹⁹ Therefore, it does not appear in the final version of the canon.

1.2 — Amiable Settlement

CIC c. 1733 / *CCEO* c. 998

Both *CIC* c. 1733 § 1 and *CCEO* c. 998 § 1 state that a person wishing to make recourse has to consider himself or herself injured by a decree. Similarly, since one of the main evangelical values is reconciliation and the Christian faithful are advised to avoid litigation or, at least, to resolve it peacefully as soon as possible (*CIC* c. 1446 and *CCEO* c. 1103), both *CIC* c. 1733 § 1 and *CCEO* c. 998 § 1 encourage the parties in conflict to work out the controversy by peaceful and amicable means, such as mutual consultation and requesting the help of wise persons who could be mediators facilitating the parties to reach an equitable solution. Likewise, both canons imply that the recourse

¹⁷ John M. HUELS, *Liturgy and Law. Liturgical Law in the System of Roman Catholic Canon Law*, Gratianus Series, Montréal, Wilson & Lafleur, 2006, 79.

¹⁸ According to the Apostolic Signatura, “the administrative act, inasmuch as it proceeds from a person who possesses administrative power, is also able to be derived from a lay person, who might have been called to cooperate in the exercise of power (administrative or executive) according to the norm of law” (“Canon 1400, § 2—Controversies from an Act of Administrative Power,” in Kevin VANN and Lynn JARRELL [eds.], *RR 1991*, 37). Thus, it seems that the phrase “any legitimate power in the Church” used in c. 996 of the *CCEO* to express the author of the decree is more encompassing than the one we find in c. 1732 of the *CIC*.

¹⁹ See *Nuntia*, 14 (1982), 99. See also *Nuntia*, 27 (1988), 61, *sub* “Can. 991.”

procedure should be the last resort and as far as possible avoided. Nevertheless, there is a subtle difference between paragraph 1 of *CCEO* c. 998 and paragraph 1 of *CIC* c. 1733. Unlike the Latin counterpart, *CCEO* c. 998 § 1 says that a controversy should be settled by the emendation of the decree, just compensation, or something else.²⁰ The legislator implies in the Eastern Code that these are the *primary* means of reconciliation. The mutual negotiation and the mediation and effort of wise people are *secondary* in the order of importance. They are there to help the parties to reach those primary means.

Paragraph 2 of *CIC* c. 1733 is unique. There is no equivalent in the Eastern legislation. It allows both the episcopal conference and the diocesan bishop, when the conference has not instructed to do so, to set up a council or office to help the parties look for equitable solutions to the dispute.²¹ If the bishops' conference mandates the creation of such agencies in its territory, their functioning in each diocese must be governed by the norms issued by the same conference. If the episcopal conference does not command their establishment, the agency established by the diocesan bishop is to follow the rules stipulated by the same diocesan bishop. For instance, the agency could apply the canonical norms of arbitration.²² It can also be the office of conciliation or mediation.²³ Before setting up such offices, however, one must keep in mind the difference between conciliation and mediation.²⁴

Paragraph 3 of *CIC* c. 1733 expressly establishes two rules that should govern the created agency's activity. First, it must be of assistance when the revocation of a singular administrative decree is requested. Second, it must

²⁰ *CCEO* c. 998 repeats nearly verbatim c. 1 § 1 of the 1972 Latin *Schema*, which contained references to the *voluntary emendation of the decree* and the *equitable/just compensation*. This reference is absent from the 1982 Latin *Schema*.

²¹ Initially, creation of the special agency was not intended. Paragraph 2 of *CIC* c. 1733 was not part of the 1972 *Schema*. It appeared only in the 1980 *Schema*.

²² Norms on the non-litigious resolution of disputes in the judicial arena are found in *CIC* cc. 1713-1716.

²³ Thomas J. Paprocki shows the difference between *conciliation* and *arbitration*: "In conciliation, a neutral person mediates the dispute with the hope of helping the parties to reach a mutually satisfactory solution; in arbitration, the parties create a binding contract in which they voluntarily agree in advance to abide by the decision of the arbitrator" (PAPROCKI, "The Method of Proceeding in Administrative Recourse and in the Removal or Transfer of Pastors [cc. 1732-1752]," in *CLSA Comm2*, 1827 [= PAPROCKI, commentary in *CLSA Comm2*].)

²⁴ *Mediation* and *conciliation* are not synonymous. "In mediation, the third party is essentially a facilitator. His role is to help the parties see each other's points of view and to emphasize points of agreement; but it is not for him to suggest or promote particular solutions to the conflict. In conciliation, too, the third party is a facilitator, but in addition he may promote agreement by suggesting a solution and pointing out its advantages" (P. CANE, *An Introduction to Administrative Law*, Oxford, Clarendon Press, 1986, 94).

provide assistance only if the time limit for making recourse has not elapsed.²⁵ While the *CCEO* does not explicitly give eparchial bishops the possibility of establishing such agencies in their eparchies, nothing prevents bishops from setting them up, since the *CCEO* does not expressly prohibit it.²⁶

Paragraph 3 of *CIC* c. 1973 says that the hierarchical superior, whose duty is to deal with the recourse against the issued decree, is to encourage the parties to seek reconciliation even after recourse has been initiated. However, there must be hope of a favourable end result. If there is not, there is no strict obligation to seek the reconciliation of the parties. Paragraph 2 of *CCEO* c. 998, like its Latin counterpart, exhorts the higher authority to make an effort to ensure that the parties look for an equitable solution. Nevertheless, in the Eastern Code, the higher ecclesiastical authority should urge the parties to seek reconciliation independently of whether there is hope of a favourable outcome or not, and this must be done before accepting the recourse. This proves again that, in the Eastern legislation, the administrative recourse should truly be the last resort in the resolution of the dispute. Preference is given to the settlement of controversies without the higher authority's intervention.

1.3 — Petition for Revocation or Emendation and Suspension

CIC c. 1734 / *CCEO* c. 999

CIC c. 1734 §1 and *CCEO* c. 999 §1 require that a person considering himself or herself injured by a singular administrative decree request in writing its revocation or emendation from the author of the decree.²⁷ In both legislations, this request also includes the petition to suspend the execution of the decree. However, according to the Latin Code, the petition to suspend is presumed “by the very fact” that the injured party seeks the revocation or emendation of the decree, while in the Eastern Code, the suspension is understood to be petitioned “by the law itself.” In either case, the explicit petition to suspend the execution of the act is not required; the injured party is presumed to be requesting its suspension automatically.²⁸

²⁵ The two rules appear only in paragraph 3 of draft c. 1693 of the 1980 Latin *Schema*. This is logical since the creation of an office of conciliation/mediation or arbitration was not part of the initial plan.

²⁶ There has never been any mention of a special agency in the Eastern *schemata*.

²⁷ The requirement to submit a written petition for the revocation or emendation of the decree is an innovation of the 1983 Code. In the past, the aggrieved party could make recourse without asking the author of the act to reconsider his or her decision. See PAPROCKI, commentary in *CLSA Comm2*, 1828.

²⁸ The presumption of the automatic request for the suspension of the decree was in draft c. 10 §1 of the 1972 Latin *Schema* and was never challenged in later *schemata*.

Paragraph 2 of *CIC* c. 1734 and *CCEO* c. 999 § 1 state that the petition to revoke or amend a singular administrative decree must be submitted to its author within a peremptory time limit of ten *useful* days after receiving notice of the decree. In both Codes, this is understood as the time which begins at the moment when the person learns of the issued decree. If the decree has not been intimated, the *useful* time does not run,²⁹ nor does it start running if a person is unable to act (see *CIC* c. 201 § 2 and *CCEO* c. 1544 § 2). Both Codes also have the same understanding of *peremptory* time: if the party does not initiate recourse within the established time limit, he or she loses the right to use the procedure once the time limit ends (see *CIC* c. 1465 § 1 and *CCEO* c. 1124).

1.4 — Exceptions to the Requirement to Request for Reconsideration *CIC* c. 1734 / *CCEO* c. 999

CIC c. 1734 § 3, 1° releases the aggrieved party from the obligation to petition for the revocation or emendation³⁰ when a singular administrative act is placed by someone who himself or herself is subject to the diocesan bishop's authority.³¹ *CCEO* c. 999 § 2 contains the same norm as *CIC* c. 1734 § 3, 1°; however, the canon is more specific, stating that the obligation to petition for revocation does not exist if the decree was issued by a syncellus or protosyncellus. In this case, the aggrieved party can make recourse directly to the eparchial bishop. Likewise, if the decree was placed by someone who acted on account of delegated power, the aggrieved party can propose recourse to the one who granted the author of the decree the delegated power.

CIC c. 1734 § 3, 2° provides for a second exception to the law, namely, the petition to revoke or amend a singular administrative decree is not required when it regards a further recourse, that is to say, when there has already been a recourse at the lower level and the injured party, not being

²⁹ *CIC* c. 54 § 2 requires the authority to intimate an administrative act to its receiver in writing; yet, for a grave reason, the act can be communicated orally in the presence of a notary or two witnesses (*CIC* c. 55). *CCEO* c. 1520 § 1 says that a decree takes legal force when it is made known in the way that is safest according to the laws and conditions of places; however, "if the danger and public harm precludes the text of the decree being given in writing," a decree can be read orally to the one to whom it is destined in the presence of two witnesses or a notary (*CCEO* c. 1520 § 2).

³⁰ The exceptions to the norm appeared in draft c. 1694 of the 1980 Latin *Schema*. Besides two minor modifications, they essentially remained the same in later *schemata*.

³¹ If the act has been issued by a member of the parochial staff, an official of the diocesan curia, a pastor, a vicar forane, an episcopal vicar or the vicar general, the injured party can make recourse directly to the diocesan bishop instead of the author of the decree. See Michel THÉRIAULT, Commentary on cc. 1732-1752, in *CLSGBI Comm*, 963.

content with the outcome of the first recourse, intends to propose a new one, but this time against the decree that decided his or her recourse at the lower level. When this is the case, there is no obligation for the injured party to petition the authority for reconsideration, unless the first recourse was judged by the diocesan bishop. *CCEO* c. 999 §2, like *CIC* c. 1734 §3, 2°, states that there is no requirement to petition for the reconsideration of the decree if it regards a further recourse. The exception is a decree of the eparchial bishop by which he decides an initial recourse.

CIC c. 1734 §3, 3° does not have a counterpart in the Eastern legislation. It states that the petition for reconsideration is not mandatory for a person who is faced with administrative silence.³² To be specific, according to *CIC* c. 57, when the authority fails to issue a decree that the law itself requires him or her to issue within three months or when the authority does not respond to the petition's legitimate request to issue a decree within the same amount of time, the inaction of the authority in question is regarded as a negative response, which gives the right to the person to propose recourse directly to the hierarchical superior.³³

Likewise, according to *CIC* c. 1735, in the context of administrative recourse, when a person asks for reconsideration of the already issued decree and the authority does not make a decision within thirty days, the authority's inaction, pursuant to *CIC* c. 57, must be understood as a negative response. Thus, the aggrieved party is not obligated to petition for the revocation or emendation again but is free to make recourse directly to the hierarchical superior of the author of the decree.

1.5 — Outcomes of the Request for Reconsideration

CIC c. 1735

CIC c. 1735 is unique; there is no corresponding canon in the Eastern Code.³⁴ The norm applies to a situation when a petition for reconsideration

³² Although the Code does not state it expressly, the canon implies that administrative silence is equated to the administrative act.

³³ Since the thirty days are not defined as *useful*, they must be *continuous* (*CIC* c. 201 §2 and *CCEO* c. 1544 §2).

³⁴ The Eastern codification fathers included this norm in the 1982 Eastern *Schema* as draft c. 372 §3. With minor modifications, it passed into draft c. 994 §3 of the 1986 *CICO Schema*. However, one of the *ex officio* amendments issued during the work of the *Coetus de coordinatione* was to incorporate a part of paragraph 3 of draft c. 994 of the 1986 *CICO Schema* into paragraph 2 of draft c. 995 of the 1986 *CICO Schema*, which became *CCEO* c. 1001, and to eliminate the rest. See *Nuntia*, 14 (1982), 100, *sub* "Can. 372 §3." See also *Nuntia*, 24-25 (1986), 178, *sub* "Can. 994 §3," as well as *Nuntia*, 27 (1988), 21, 26.

or emendation of a decree is mandatory for the injured party. The canon envisages two possible outcomes of this request: either the author of the decree within thirty days issues a new decree, declaring that he revokes the previous one, emends it or rejects the request, or he chooses administrative silence. In the first case, the time to propose a recourse begins to run from the moment the injured party is notified of the new administrative decree. In the second case, the time limit runs from the thirtieth day.³⁵

1.6 — Suspension of the Decree

CIC c. 1736, 1737 § 3 / CCEO c. 1000

Since *CIC* c. 124 § 2 and *CCEO* c. 931 § 2 state that juridic acts are presumed to be valid if they are placed correctly, this applies to singular administrative decrees. Thus, paragraph 1 of *CIC* c. 1736 and paragraph 1 of *CCEO* c. 1000 imply that a proposed recourse against a singular administrative decree does not automatically suspend the execution of the challenged decree, nor does a petition for its revocation and emendation; nevertheless, a petition does have a suspensive effect when the law expressly states that an administrative recourse suspends the execution of a decree.³⁶

When the suspension is not automatic, the norms contained in paragraph 2 of *CIC* c. 1736 and paragraph 2 of *CCEO* c. 1000 give two options to the author of the decree. Within ten days after receiving the request for suspension of an administrative act, the author can suspend the execution of the challenged act or decide not to do so. If the authority chooses not to grant the suspension, the aggrieved party can petition the suspension of the act from his or her superior. The Latin Code defines the superior as the “hierarchical superior” while the Eastern Code refers only to “higher authority.” Both Codes urge the ecclesiastical superior of the author of the decree to be cautious and to suspend the decree only for a grave reason, so that the good of souls does not suffer any harm.

³⁵ Draft c. 10 § 4 of the 1972 Latin *Schema* did not make a provision for inaction by the author of the decree. It only stated that the time limit for making recourse would begin from the notification of the new decree. The thirty-day discernment period for administrative authority was established in draft c. 1695 of the 1980 *Schema*. Likewise, in the same *Schema*, the codification fathers provided for a situation in which a thirty-day interval elapses without a new administrative act being issued.

³⁶ Instances in the *CIC* where recourse and a petition for revocation and emendation suspend the execution of a singular administrative decree are in cc. 700, 729, 746, 1353, 1747 § 3, and 1752. Instances in the *CCEO* are in cc. 438 § 1, 440 § 2, 501 § 2, 552 § 3, 583 § 2, 991 § 2, 1396 § 3, and 1487 § 2.

According to paragraph 3 of *CIC* c. 1736 and paragraph 2 of *CCEO* c. 1000, if the decree was suspended by its author and the injured party subsequently proposed a recourse against it, the hierarchical superior, or higher authority, must decide whether to confirm or revoke the enacted suspension. However, if the injured party does not make recourse against the decree within the time limit stated in the law, the temporary suspension of the decree terminates automatically. This automatic cessation, according to *CIC* c. 1736 §4, occurs by “the very fact” that recourse has not been proposed within the indicated time period; *CCEO* c. 1000 §3 declares that the suspension ceases “by the law itself” when the petitioner does not present hierarchical recourse.³⁷ Unlike *CIC* c. 1736 §4, *CCEO* 1000 §3 envisages a case where a petitioner, having obtained the suspension of the decree, makes recourse to higher authority solely seeking reparation of damages. In that situation, the suspension of the execution of the decree, according to *CCEO* c. 1000 §3, ceases *ipso iure*.³⁸

Paragraph 3 of *CIC* c. 1737 does not have an equivalent in the Eastern Code. It states that the hierarchical superior can suspend the execution of the decree without being requested to do so by the aggrieved party or being obliged to confirm or revoke the suspension of the execution of the decree by law. However, the canon stresses that the ecclesiastical authority must not grant the suspension for a trivial reason. Moreover, he must see that the salvation of souls suffers no harm,³⁹ that is to say, the superior must balance the legitimate individual good of the one making recourse and the common good.

1.7 — Reasons and Time Limits for Submitting Recourse

CIC cc. 1737 §1, 1731 §2 / *CCEO* cc. 997 §1, 1001

CIC c. 1737 §1 states that the right to recourse involves a person who *claims* to have been aggrieved by a decree. *CCEO* c. 997 §1 says that the right to recourse involves a person who *considers himself or herself* aggrieved

³⁷ Initially, the Eastern codification fathers used the same formula as the Latin fathers, namely, *eo ipso cessat*, but it was changed to *ipso iure cessat* in the 1986 Eastern *Schema*. See *Nuntia*, 14 (1982), 100, *sub* “Can. 373 §4.” See also *Nuntia*, 24-25 (1987), 179, *sub* “Can. 995 §3.”

³⁸ The reference to a recourse seeking solely the reparation of damages originated in the Eastern legislation from the Latin codification process. It can be found in all Latin *schemata* (1972, c. 12 §3; 1980, c. 1696 §4; 1982, c. 1744 §4). However, it was removed from the 1982 Latin *Schema* when the final changes were being made by the Supreme Pontiff prior to the promulgation of the text as *CIC* c. 1736 §4.

³⁹ The demand that *the salvation of souls* be taken into consideration by the hierarchical superior was placed in draft c. 1699 §3 of the 1980 Latin *Schema*. It is not found in the initial 1972 project.

by a decree.⁴⁰ Both canons declare that the recourse must be made to the hierarchical superior, or higher authority, of the one who issued the decree. Unlike the Eastern legislation, *CIC* c. 1737 § 1 specifies that recourse to the hierarchical superior can be made for *any just reason*.⁴¹ Moreover, it adds that the aggrieved party can propose recourse either directly to the hierarchical superior or to the author of the challenged decree whom the law obliges to transmit the recourse to his or her higher authority immediately.⁴²

Paragraph 2 of *CIC* c. 1737 and paragraph 1 of *CCEO* c. 1001 say that the injured party can make recourse within a peremptory time limit of fifteen days.⁴³ The Latin law specifies that those days are *useful* days. Since there is no such specification in the Eastern law, the fifteen-day period in *CCEO* 1001 § 1 must be computed as *continuous*, not *useful*, in the sense of *CCEO* c. 1544 §§ 1-2.⁴⁴ According to *CIC* c. 1737 § 2 and *CCEO* 1001 § 2, 1°, when

⁴⁰ Since *CIC* c. 113 § 2 and *CCEO* c. 920 speak of a person as physical or juridic, *CIC* c. 1737 § 1 and *CCEO* c. 997 § 1 imply that both public and juridic persons are capable of proposing recourse. The recourse of a juridic person, however, has to be made through its legal representative (*CIC* c. 113 § 2 and *CCEO* c. 920). "According to the 1987 authentic interpretation of the then Pontifical Commission for the Interpretation of the *Code of Canon Law*, a group of the faithful which has neither juridic personality nor even the recognition mentioned in *CIC* c. 299 § 3 (cf. *CCEO* c. 573 § 2) cannot make recourse as such, although its members might be able to do so as individuals, that is, as physical persons." See Joseph R. PUNDERSON, "Hierarchical Recourse to the Holy See: Theory and Practice," in *CLSAP*, 62 (2000), 24 [= PUNDERSON, "Hierarchical Recourse to the Holy See"].

⁴¹ The language for *any just reason* was placed in draft c. 1699 § 2 of the 1980 Latin *Schema*. According to John C. Meszaros, "Although the petitioner can make the recourse 'for any just reason,' the petitioner should state that the alleged violation entails a specific violation of a subjective right, a denial of proper procedure, or some substantial question of merit. The basis of the request should have some foundation in law" (MESZAROS, "Procedures of Administrative Recourse," in *Jur*, 46 [1986], 116).

⁴² The possibility to make recourse to the author of the decree is absent from all Latin *schemata*. It appeared with the last corrections of the final *schema* by the Supreme Pontiff prior to its promulgation.

⁴³ The peremptory time limit in draft c. 15 § 1 of the 1972 Latin *Schema* was only ten days. It was extended to fifteen days in the 1980 Latin *Schema*, draft c. 1699 § 2. Similarly, as can be seen in draft c. 995 § 2 of 1987 *CICO Schema*, the Eastern codification fathers started the peremptory time limit with ten days but the *Coetus de coordinatione* issued an ex officio amendment in 1988 changing it to fifteen days. See *Nuntia*, 24-25 (1987), 179 and *Nuntia*, 27 (1988), 26.

⁴⁴ Both Codes make exceptions to the norms found in *CIC* c. 1737 § 2 and *CCEO* c. 1001 § 1. *CIC* c. 700 says that, in the case of dismissal of a religious, the time limit to propose recourse is ten *useful* days. *CCEO* 1001 § 1 gives the time limit of fifteen days to make recourse against the decree of dismissal of a religious, but it does not say that the days are *useful*. *CCEO* c. 1487 § 1 makes another exception to the rule. It states that recourse against a decree that imposes a penalty has to be introduced within ten *useful* days, while the Latin legislation, applying *CIC* c. 1737 § 2, gives a fifteen-day time limit.

the petition for revocation and emendation is mandatory, the time for proposing recourse begins running from the day when a new decree, emending or revoking the earlier one or altogether rejecting the petition to reconsider the act, is communicated to the injured party.

If the petitioner is faced with inaction by the author of the decree, both *CIC* c. 1737 § 2 and *CCEO* c. 101 § 2, 1° give him or her the right to make recourse to the hierarchical superior from the thirtieth day after his or her petition for emendation or revocation has been submitted to the author of the decree. When the petition for emendation or revocation is not required, *CIC* c. 1737 § 2 and *CCEO* c. 1001 § 2, 2° state that a peremptory time limit of fifteen days begins running from the day on which the administrative decree was communicated to the addressee.

1.8 — Time Limits for Higher Authority

CCEO c. 1002

CCEO c. 1002 obliges the higher authority to render a decision on the proposed recourse within sixty days, unless the proper Church *sui iuris* in its particular law establishes other time limits. If a decision is not made, the aggrieved party has to petition again for a decree rendering a decision.⁴⁵ This time, the higher authority is obliged to respond to the petitioner within thirty days. If the decree has not been issued within the indicated time period, the recourse is presumed to be rejected, and the aggrieved party has the right to submit a new recourse against the authority. Following the norm of *CCEO* c. 1001 § 1, the time limit for making a new recourse is fifteen days from the issuance of the “silent decree.” This canon is an application of *CCEO* c. 1518, which governs any request for an extrajudicial decree.

There is no canon in the Latin legislation that would explicitly determine the time limit for the hierarchical superior to render a decision. However, *CIC* c. 57 can be considered a parallel canon to *CCEO* c. 1002. It states that, after receiving the petitioner’s request to issue a decree, the superior is supposed to issue a decree within three months. The superior’s failure to issue the decree must be interpreted as a negative response, and the petitioner may make further recourse on the basis of the superior’s silence.

⁴⁵ The canon does not indicate a time limit during which the aggrieved party has to make this second petition.

1.9 — Protection of Rights

CIC c. 1738 / CCEO c. 1003

CIC c. 1738 and *CCEO c. 1003* state that the aggrieved party may employ the help of an advocate or a procurator to assist him or her during the recourse process.⁴⁶ If the party did not provide for one, an advocate or a procurator must be appointed *ex officio* by the hierarchical superior, or higher authority, if deemed necessary. Nevertheless, the help of a canonical assistant does not take away the superior's right to communicate directly with the aggrieved party. Therefore, both legislations emphasize that the person making recourse may be called in for questioning. Unlike the Latin legislation, *CCEO c. 1003* adds that, in recourse against administrative acts, the procedure for issuing extra-judicial decrees, presented in *CCEO c. 1517*, must be observed by the higher authority. In other words, prior to issuing a singular administrative decree that decides a recourse, the ecclesiastical superior is obliged to gather proofs, seek necessary information about the case, consult the people who may have some interest, and talk to those whose rights could be injured (see *CCEO c. 1517 § 1*). Having all this information, if there is no danger of public or private scandal, the superior must share the obtained information with both the author of the challenged decree and the party making recourse, giving each of them an opportunity to respond. The arguments can be presented by the parties themselves or through their advocates within the time period established in the law (see *CCEO c. 1517 § 2*). Although the Latin Code does not oblige the hierarchical superior to share the obtained information with both parties, *CIC c. 50*, like *CCEO c. 1003*, requires any authority, prior to issuing a singular administrative decree, "to seek out the necessary information and proofs and, in so far as possible, to hear those whose rights can be injured."

1.10 — Norms for Superior Authority

CIC c. 1739 / CCEO c. 1004

CIC c. 1739 and *CCEO c. 1004* state that the hierarchical superior, or higher authority, is allowed not only to confirm the decree or declare it null,

⁴⁶ The advocate or procurator cannot be used at the initial phase of presenting a petition for revocation or emendation. According to Jorge Miras, "The motive is clear. Here one is not dealing with the recourse but with a simple petition (...). Therefore, the personal intervention of the interested party is sufficient, and he does not thereby bring about a lack of defence, since the juridical defense of this situation occasioned through the administrative act will begin properly with the later recourse" (MIRAS, Commentary on Canon 17434, in *Exegetical Comm.*, vol. 4, 2067).

but also to rescind it or revoke it. The Latin law, unlike the Eastern legislation, adds that the superior can do any of these actions when *the case warrants it*. Moreover, it states that the hierarchical superior has the right to amend, replace, or modify the decree *if it seems expedient to him*. *CCEO* c. 1004, on the contrary, does not grant a higher authority the right to amend a decree at will. It can be done only if the particular law of the Church *sui iuris* to which the higher authority belongs grants him the power to do it. The canon does not say anything about the higher authority's power to replace or modify the first decree. Thus, this power belongs only to the author of the challenged decree.⁴⁷

1.11 — Reparation of Damages *CCEO* c. 1005

CCEO c. 1005 does not have a counterpart in the Latin legislation. It states that the higher authority who confirms, declares null, rescinds, revokes, or amends the first decree is not responsible for the reparation of damages caused by the challenged decree. It is the liability of the author of the decree. However, if damages arise from the decree of the higher authority by which the recourse is decided, it is the responsibility of the higher authority to repair the damages. The Latin Code speaks about damages in general. In *CIC* c. 128, the legislator says that “whoever illegitimately inflicts damage upon someone by a juridic act or by any other act placed with malice or negligence is obliged to repair the damage inflicted.” It is a general obligation applicable, in the context of administrative recourse, both to the author of the decree and his or her hierarchical superior.⁴⁸

⁴⁷ Confirmation of the act means that the higher superior gives support to the decision of the authority who issued the act. Declaring the act null indicates that the act is invalid on account of the violation of a law or some technical defect. Revocation of the act means that the higher superior cancels the administrative act and makes it impossible to enforce, but he does not address its validity. By emending the act, the superior leaves the act in force but modifies it. Replacement of the act means that a new act is substituted for the old one. See PAPROCKI, commentary in *CLSA Comm2*, 1832.

⁴⁸ According to Kenneth K. Schwanger, “A claim for damages cannot be made before the Signatura unless it is joined to recourse against the administrative act that is the basis of the claim. When the two claims are joined, the Signatura will examine not only the illegitimacy of the administrative act, but also whether there was a violation of a subjective right to be compensated” (SCHWANGER, “Contentious-Administrative Recourse before the Supreme Tribunal of the Apostolic Signatura,” in *Jur*, 58 [1998], 181).

1.12 — Special Norms for Recourse against Patriarchs *CCEO* c. 1006

CCEO c. 1006 states that it is possible to propose recourse against an administrative decree of a Patriarch, regarding the patriarchal eparchy or deciding another recourse. This recourse must be made to a special group of bishops, determined by the particular law of the Church *sui iuris*. Nevertheless, if the aggrieved party wishes, he or she may refer the matter directly to the Apostolic See. If the decision taken by the special group of bishops does not satisfy the aggrieved party, he or she can make a further recourse directly to the Roman Pontiff.

2 — *Evaluation of the Norms on Recourse*

Having compared the procedures of hierarchical recourse established in both Codes, we may proceed to their evaluation. This second part treats three areas: (1) the novelty of *CCEO* cc. 996-1006; (2) the novelties of the *CIC* in the process of hierarchical recourse; and (3) some critical observations on the *CIC* and *CCEO* provisions for hierarchical recourse.

2.1 — Novelty of *CCEO* cc. 996-1006

When considering the *CCEO* norms on administrative recourse, it is important to mention that no detailed procedure for proposing hierarchical recourse was found in any of the four apostolic letters *motu proprio* issued by Pius XII between 1949 and 1957, which constituted the partial Code of the Eastern Catholic Churches before the promulgation of the *CCEO* in 1990. In c. 36 of the 1950 *motu proprio Sollicitudinem Nostram* on judicial procedures, Pius XII merely mentioned that only recourse, not appeal, can be proposed against the decrees of hierarchs, and in c. 145 of the 1957 *motu proprio Cleri sanctitate*, the same Pontiff simply recognized the right to hierarchical recourse. Thus, what we observe in the *CCEO* on this topic is a novelty. As we have seen earlier, the *CCEO* very much mirrors the norms of the *CIC*, promulgated in 1983. This is not an accident. In matters of trials and procedural law, above all administrative procedures, the fathers of the Eastern codification process expressed the desire that all Catholics have the same norms.⁴⁹ This explains the overwhelming similarity between the two Codes in matters of recourse.

⁴⁹ See NEDUNGATT (ed.), *A Guide to the Eastern Code*, 675. See also Thomas J. GREEN, "The Latin and Eastern Codes: Guiding Principles," in *Jur*, 62 (2002), 261-262.

2.2 — *CIC* Novelties in the Process of Hierarchical Recourse

Given that the formation of the hierarchical recourse procedure in *CCEO* cc. 996-1006 was very much shaped by *CIC* cc. 1732-1739, it is necessary to examine the *CIC* revision process as regards to recourse. According to Thomas Paprocki, the 1983 Latin Code was strongly influenced by the norms found in the Pio-Benedictine Code. However, the new Code contains some novelties that were absent from the 1917 Code, namely: (1) the requirement for the aggrieved party to request emendation or revocation of the singular administrative act from its author prior to proposing hierarchical recourse; (2) the optional establishment of the office of conciliation in all Latin dioceses; and (3) the aggrieved party's right to use an advocate or procurator in the process of hierarchical recourse. Aside from these three innovations, the 1983 Latin Code contains mostly the same norms for hierarchical recourse that were present in the 1917 Code, that is to say, they indicate the existence of such a recourse, indicate time limits for different stages of recourse, provide norms that deal with suspension of the decree and present various options that the superior may take up in deciding the recourse.⁵⁰

The procedure was also influenced by the civil administrative law of Italy. According to Kurt Martens, this should not be a surprise: "Pio Ciprotti, an Italian professor and relator of the study group responsible for preparing the first schema, highly influenced the outcome of the work. It should also be noted that the canonical system is part of the continental legal or civil tradition."⁵¹

2.3 — Some Critical Observations

In this section, we offer some critical observations on the norms for hierarchical recourse in the Latin and Eastern Codes. These are considered under seven headings: (1) the mediation and effort of "wise" or "serious-minded" persons; (2) the agency of conciliation; (3) a delicate call for reconciliation; (4) the discretion of the hierarchical superior or higher authority; (5) the diocesan or eparchial bishop's right to decide the recourse of his subordinate; (6) the right to counsel; and (7) due process in administrative recourse.

⁵⁰ See Thomas J. PAPROCKI, "Vindication and Defense of the Rights of the Christian Faithful through Administrative Recourse in the Local Church," JCD thesis, Rome, Pontificia Universitas Gregoriana, Facultas iuris canonici, 1991, 89 (= PAPROCKI, "Vindication and Defense of the Rights of the Christian Faithful").

⁵¹ Kurt M. MARTENS, "Protection of Rights: Experience with Hierarchical Recourse and Possibilities for the Future," in *Jur*, 69 (2009), 654.

2.3.1 — *Mediation and effort of ‘wise’ or ‘serious-minded’ persons*

The fact that *CIC* c. 1733 § 1 invites the disputed parties to use the *mediation and effort of wise* or, as *CCEO* c. 998 § 1 puts it, *serious-minded* persons to avoid and settle the controversy in a suitable way is commendable, since it often happens that conflicting parties are unwilling to dialogue. Therefore, the assistance of a sage person in resolving the controversy may be very effective. However, it is impossible not to notice that both canons contain only a simple reference to such a person without adding anything more. According to Martens, this is an occasion for the particular law to step in and create a procedure of mediation. On the other hand, the role of a sage person should not be exaggerated so as not to make a caricature of it or give a pretext for some immobility. If it becomes evident that reconciliation is impossible, it is necessary to look for other means to assist the parties in conflict.⁵²

2.3.2 — *Agency of conciliation*

CIC c. 1733 § 2 indicates that, among those other means of conciliation, there could be a special agency, called an office or a council, whose function would be to seek and suggest an equitable solution for the parties, when the assistance of a wise person becomes ineffective. Unfortunately, the establishment of such agencies is not obligatory. *CIC* c. 1733 § 2 states that episcopal conferences can mandate their establishment and determine their norms of functioning, but the law does not oblige them to do so. The initiative is left purely to the discretion of the bishops' conference. The Eastern Code does not even mention the possibility of establishing such an agency. According to Pinto, since the common good of the faithful prevails over the individual good and the responsibility to promote and defend the common good primarily belongs to the executive authority of the Church, the fathers of the Eastern codification process considered it inappropriate to resolve a conflict between a member of the faithful and an executive authority by means of arbitration or by empowering a special agency to find "an amicable solution." This is the duty of the executive authority. The author of the decree is presumed to be prudent enough not only to weigh all the pros and cons before issuing a decree but also, in case of a conflict, together with an injured party, to find ways of avoiding the controversy, leaving to his free decision

⁵² See Kurt M. MARTENS, "Administrative Procedures in the Roman Catholic Church: Difficulties and Challenges," in *CLSAP*, 44 (1983), 228-229.

the possibility to amend the decree or to compensate for the injury, as prescribed in c. 998 § 1 of the *CCEO*.⁵³

Even if we acknowledge that in certain instances it may be inappropriate to resolve a conflict between a member of the faithful and an executive authority by means of arbitration or by empowering a special agency to find an amicable solution, the mandatory establishment of the office or council of mediation or conciliation in both legislations would ensure the external and impartial evaluation of the situation. It would also ensure that *both* parties truly seek an equitable solution as *CIC* c. 1733 § 1 and *CCEO* c. 998 § 1 encourage them to do. *CIC* c. 1734 § 1 and *CCEO* c. 999 § 1 require that the person who considers himself or herself aggrieved by a singular administrative act seeks its revocation or emendation from its author prior to proposing an administrative recourse to the higher superior, thereby giving the lower authority an opportunity to review his or her administrative act. However, there is no guarantee that the author of the decree will do it. Everything depends on the author's personal willingness to review the act. The mandatory establishment of the office or council of mediation would ensure that the author of the decree takes action to reconsider his or her issued act and seeks an equitable solution by common counsel.

That this mutual searching for a solution is important for the legislator is evident from *CIC* c. 1733 § 3, in which he urges the hierarchical superior to exhort the parties to look for a fair and just solution whenever he sees some hope of a favourable outcome. *CCEO* c. 998 § 2 implies that the higher ecclesiastical authority should urge the parties to seek reconciliation independently of whether there is hope of a favourable outcome of the parties' negotiation or not.

2.3.3 — *Delicate call for reconciliation*

This leads us to analyze another significant difference between the two legislations. In the Latin Code, the hierarchical superior can encourage the parties to seek reconciliation *even after* recourse has been initiated (c. 1733 § 3). In the Eastern Code, the urging can and must be done only *before* accepting the recourse from the aggrieved party (c. 998 § 2).

The continual exhortation to avoid litigation in the Latin Code is not without risk. It can violate the person's freedom and his or her right to seek adjudication. As John Meszaros indicates, "the superior cannot move the

⁵³ See Pio V. PINTO, Commentary on cc. 996-1066, in NEDUNGATT (ed.), *A Guide to the Eastern Code*, 682-683.

parties to the point of an onerous contract against their free will. (...) The lines between ‘urging’ and ‘forcing’, between ‘hope’ and ‘no hope’ of success, have yet to be drawn.”⁵⁴ Thus, by declaring that the urging must be done *before* accepting the recourse and not *after*, the Eastern norm seems to have drawn that fine line, if not between hope and not hope, then, at least, between urging and forcing. According to Meszaros, the drawing of the same line in the Latin Code should not be left to the discretion of the hierarchical superior. The superior should be provided with some guidelines to help him not cross certain boundaries.⁵⁵

2.3.4 — Discretion of the ecclesiastical authority

Another noticeable feature in the Latin legislation is the hierarchical superior’s right not only to confirm the act of the authority subordinate to him, to declare it null, revoke or rescind it, *when the case warrants it*, but also his right to change the act by way of emending, replacing, or modifying it, *if it seems expedient to him* (CIC c. 1739). In contrast, CCEO c. 1004 permits the higher authority to amend a singular administrative act of the lower superior only on the condition that the *ius particularis* of the Church *sui iuris* allows him. The canon does not say anything about the higher authority’s power to replace or modify the first decree. Thus, this power belongs only to the author of the challenged decree.

It is hard to judge the effectiveness of these two different norms. However, CCEO c. 1004 has the sense of being more respectful of the lower authority. The Eastern norm presupposes that the lower superior may know the local situation better than the hierarchical authority whose decision to amend, modify, or replace the act would not necessarily do justice to the aggrieved party or promote the common good of the faithful. In other words, the right of the Latin hierarchical superior to settle the recourse, by replacing the lower authority’s judgment with his own, can lead to unintentional harm and damage. As John E. Beal puts it, the higher authority “... will often not acquire much supplementary evidence ...; he will also usually have a dimmer sense of the implication of the various alternative solutions to addressing the problem that prompted the administrative act. As a result, his attempt to resolve a controversy by substituting his own solution for the problem may only make a bad situation worse.”⁵⁶ Therefore, by limiting the hierarchical

⁵⁴ John C. MESZAROS, “Procedures of Administrative Recourse,” in *Jur*, 46 (1986), 116.

⁵⁵ Ibid.

⁵⁶ BEAL, “Hierarchical Recourse: Procedure at the Local Level,” 106.

superior's power to confirm, declare null, revoke, or rescind a singular administrative act of his subordinate, the Eastern norm is showing confidence in the lower superior's capacity adequately to evaluate the situation and, if need be, amend, replace, or modify the issued decree. On the other hand, since the only person who is allowed to make such changes is the author himself, the establishment of a special agency of mediation in Eastern Churches *sui iuris* seems to be very important, although this possibility is not even mentioned in the *CCEO*.

2.3.5 — *Bishop's right to decide recourse*

A critical point can also be raised regarding the diocesan or eparchial bishop's right to judge a proposed recourse against his subordinates. On the one hand, this right, established in *CIC* c. 1734 § 3, 2° and *CCEO* c. 999 § 2, makes good sense. The norms respect and support the principle of subsidiarity,⁵⁷ and they safeguard the bishop's ability to take decisions and actions without the higher authority's intervention. On the other hand, since the bishop has to ensure and protect the ecclesiastical communion in the territory entrusted to his care, the right and duty to decide such recourse may lessen his ability effectively to serve the ecclesiastical communion and be the sign of its unity. Besides, it would be extremely hard to prove to the disappointed party that the bishop is not merely defending his subordinate if he decided the recourse against the interests of the aggrieved party.⁵⁸ Furthermore, if one acknowledges that balanced and harmonious relationships between the bishop and his subordinates are of vital importance, the responsibility to decide a recourse against the bishop's co-workers can be a tremendous burden on him. Therefore, it would be very wise for the bishop to delegate his power to decide recourses of such nature to someone else who is impartial. If the aggrieved party were not content with the outcome of the recourse, he or she then could propose recourse directly to the bishop, who would render a decision regarding the further recourse. This participation of the impartial delegate in deciding recourses, at least at their initial state, would reinforce the value of impartiality and would reduce the impression of bias.⁵⁹

⁵⁷ The Synod of Bishops, held in Rome from 29 September to 20 October 1967, approved the principle of subsidiarity as one of the ten guiding principles for the revision of the 1917 Latin Code. See PAPROCKI, "Vindication and Defense of the Rights of the Christian Faithful," 204.

⁵⁸ See John P. BEAL, "Protecting the Right of Lay Catholics," in *Jur*, 47 (1987), 161.

⁵⁹ See *ibid.*, 163.

2.3.6 — *Right to counsel*

As mentioned earlier, one of the novelties of the Latin Code that distinguishes it from the 1917 Code is the stated right to counsel. This is a significant innovation. The aggrieved party can use the service of an advocate or a procurator at all stages of the process. However, *CIC* c. 1738 does not grant the same right to the lower authority issuing a singular administrative decree. Only the party taking recourse has the right to counsel. Thus, it seems that the Latin law gives some advantage to the aggrieved party over the author of the decree. It is inclined to favour one party.⁶⁰ Looking at this situation from the perspective of equity, the grant of the right to counsel only to the aggrieved party may contain in itself some injustice. Moreover, the 1967 Synod of Bishops clearly stated that “in canon law the juridic protection of rights was to be applied equally to superiors and those subject to them so that there be eliminated any suspicion or arbitrariness in ecclesiastical administration.”⁶¹ Thus, *CIC* c. 1738 appears to go against the principle of the synod that was approved for the revision of the Code of Canon Law. In addition, the law says nothing about the necessary qualification of advocates or procurators who would assist the party with their counsel.⁶² The same critique can be applied to the Eastern legislation, since *CCEO* c. 1003 is identical to the Latin one.

2.3.7 — *Due process in administrative recourse*

Thomas Paprocki points out that the Latin Code says nothing on the subject of “due process or procedure that would be obligatory to follow in administrative recourse.”

For example, nothing is said about procedural safeguards normally associated with the notion of due process: the right to notice, the right to be heard, the right to confront one’s accusers, the right to cross-examination, the gathering of evidence, proofs, testimony, witnesses, refutation, a written decision, statement of reasons, the right not to be judged by one’s accuser, or the right to propose further recourse to a higher authority against the decision of the hierarchic superior. The hierarchic superior seems to enjoy unlimited discretion in resolving the controversy.⁶³

⁶⁰ See PAPROCKI, “Vindication and Defense of the Rights of the Christian Faithful,” 84.

⁶¹ Joseph R. PUNDERSON, “Hierarchical Recourse to the Holy See: Theory and Practice,” in *CLSAP*, 62 (2000), 20.

⁶² See PAPROCKI, “Vindication and Defense of the Rights of the Christian Faithful,” 84.

⁶³ *Ibid.*, 90.

It is generally agreed that there is a *lacuna iuris* in the administrative law of the 1983 Latin Code. The Code provides the initial elements of hierarchical recourse but does not fully “concatenate the step-by-step procedures to be followed in the process of administrative recourse.”⁶⁴ As recognised by Lamberto de Echeverria, this *lacuna iuris* could be supplied by following *CIC* c. 19, which provides a remedy for such a hole in the law.⁶⁵ Thus, it is possible to fill the lacuna in the procedural law with parallel norms from Book VII of the Latin Code on the processes in the ordinary judicial tribunal. Nevertheless, since the canons in Book VII deal with contentious trials, it would seem totally inappropriate to apply them to administrative recourse, which is a different kind of way of solving controversies. It would be more suitable to look for comparable norms in civil administrative law or administrative justice than in the judicial forum of contentious trials. This does not mean that the Latin Church should function according to civil administrative law but simply that there is nothing in the ecclesiastical law, custom, or doctrine that would forbid the canonization of these laws for the good of the Church, all the more so that the Church has already adopted the concept of conciliation and arbitration from Roman law.⁶⁶

According to Paprocki, the canonical hierarchical recourse procedure could be supplemented at least by adding five procedural rights from the civil law model of administrative justice: the right to an impartial decision-maker, the right to adequate notice, the right to be heard, the right to assistance and representation, and the right to an equitable decision and remedies. He asserts that “these five procedural rights provide the basis upon which a just process may be built, out of which fair principles of administrative justice should flow, and from which equitable remedies can result.”⁶⁷

Conclusion

This brief study has compared the *CIC* and the *CCEO* concerning the procedure for hierarchical recourse, demonstrating that they contain a large number of identical norms. As for differences, some of them are purely syntactical and terminological; others can be considered more significant. For example, the Eastern Code contains norms that are more detailed and

⁶⁴ Ibid., 91.

⁶⁵ *CIC* c. 19 is equivalent to *CCEO* is c. 1501.

⁶⁶ See PAPROCKI, “Vindication and Defense of the Rights of the Christian Faithful,” 93.

⁶⁷ Ibid., 213-214.

more specific than their Latin counterparts, or they concern solely the Eastern Churches *sui iuris*. Overall, there are no major differences between the two Codes. As mentioned previously, some norms that are absent from the canons on hierarchical recourse in the *CIC*, which are present in the *CCEO*, are found in other parts of the Latin Code or other sources of Latin legislation and can be applied to the procedure of hierarchical recourse without difficulty.

If we can speak about significant differences, there are only two. First, the Eastern Code, unlike the Latin legislation, limits the hierarchical superior's unlimited discretion in resolving controversies. It does this by obliging him to render a decision on the proposed recourse within sixty days, unless the proper Church *sui iuris* in its particular law establishes other time limits. The Latin legislation does not contain a canon in the Code that would explicitly determine the time limit for the hierarchical superior to render a decision. Also, in the Eastern legislation, the higher authority is not allowed to amend, modify, or replace the decree in deciding recourse, unless the particular law of the Church *sui iuris* allows him, while in the Latin Code the superior can do all this at will. In the same line of thought, the Eastern Code declares that it is possible to propose recourse against the decision made by the higher superior. The *CIC* does not even mention such a possibility.

The second difference is that Latin Code allows the episcopal conference and, if the conference has not acted, the diocesan bishop to set up a special agency that could help the parties to look for an equitable solution to the dispute. This is one of the greatest Latin innovations, but it was not incorporated into the *CCEO*.

On a final note, it is important to mention that the hierarchical recourse procedure was constructed mainly as a means for higher ecclesiastical authority to exercise some control over the lower authority. It allowed the higher authority to oversee the activities of lower authorities and ensure that the public administration of their subordinates is legal. Some canon lawyers believe even today that this procedure only indirectly and secondarily protects the rights of the faithful. Its principal focal point is the legality of administrative acts.⁶⁸

The Second Vatican Council, in its dogmatic Constitution *Lumen gentium*, presents the Church first of all as a communion.⁶⁹ Thus, the procedure for hierarchical recourse should be seen first and foremost as being destined for the fostering of this communion and the promotion of the salvation of

⁶⁸ See BEAL, "Hierarchical Recourse: Procedure at the Local Level," 106.

⁶⁹ *Lumen gentium*, nos. 18, 20, 21, 28, 31.

souls.⁷⁰ When the communion has been harmed, administrative recourse is one of the ways by which the Church furnishes appropriate measures for its healing and restoration, and this is the main purpose of administrative justice in the Church. The healing and restoration of the communion makes the vocation of the Christian faithful more fruitful and renders their collaboration more efficacious.⁷¹ Therefore, to see the hierarchical recourse procedure only as a means for higher ecclesiastical authority to exercise some control over the lower authority or simply as a legal instrument for vindicating rights would not be reflective of the metaphysical reality of the Church presented in the *Lumen gentium*. Let us hope that this evolution of thought, with the help of the Holy Spirit, will continue to enlighten us on the nature of the Church and the true purpose of its procedures.

⁷⁰ See PUNDERSON, "Hierarchical Recourse to the Holy See: Theory and Practice," 20.

⁷¹ See Zenon GROCHOLEWSKI, "Theological Aspects of the Judicial Activity of the Church," in *Jur*, 46 (1986), 554-556.

BISHOPS AND THE LOSS OF THE CLERICAL STATE

W. BECKET SOULE, O.P.

SUMMARY — While the loss of the clerical state, either upon petition or as the result of a penal process in dismissal from the clerical state, has regularly occurred for deacons and presbyters, a voluntary return to the lay state was not permitted for bishops and penal dismissal was most rare and unpublicised. This article reviews more recent cases of the loss of the clerical state by cardinals and bishops, both as a penalty and by petition to the Holy See, along with the penalty of reduction in grade in the Eastern Code. As a point of reference, the history and practise of deposition and laicisation of bishops in the Anglican Communion, particularly the Episcopal Church in the United States, is surveyed.

RÉSUMÉ — La perte de l'état clérical – qu'elle soit la conséquence d'une pétition ou d'un procès pénal –, a régulièrement eu lieu pour les diacres et les prêtres. Cependant, le retour volontaire à l'état laïc n'était pas permis aux évêques et la tenue d'un procès pénal pour les renvoyer de l'état clérical était rarissime et ne faisait l'objet d'aucune publication. Cet article passe en revue les cas les plus récents de perte de l'État clérical par les cardinaux et les évêques, à la fois comme sanction et par requête auprès du Saint-Siège. L'auteur présente aussi la peine de réduction de grade du Code des églises orientales. Comme point de référence, l'histoire et la pratique de la déposition ainsi que de la laïcisation des évêques de la Communion anglicane, en particulier de l'Église épiscopale des États-Unis, font l'objet d'une analyse.

Introduction

The canons of the Eastern and Latin Codes, as well as the 1980 circular letter *Per litteras* on procedures for dispensations from the obligations of the clerical state and from clerical celibacy,¹ do not explicitly provide for the loss

¹ Cf. CONGREGATION FOR THE DOCTRINE OF THE FAITH, *De modo procedendi in examine et resolutio petitionum quae dispensationem a caelibatu respiciunt*, 14 October 1980, in AAS, 72 (1980), 1132-1137.

of the clerical state by bishops.² While rare, such cases have occurred over the past fifty years, typically in a penal context, although some bishops have requested and been granted a release from the clerical state. In the following survey, recent cases of dismissal or loss of the clerical state for cardinals and bishops in the Latin Church will be reviewed, as well as the penalty of reduction in rank in the Eastern Code. As a point of reference to other Western churches with the historic episcopate, the more extensive experience of deposition of bishops within the Anglican Communion, and particularly the Episcopal Church in the United States, will be compared to the practise of the Roman Catholic Church, both in procedures and in the reasons for which deposition has been applied. In both Catholic and Anglican circles, it is clear that this use of deposition or dismissal has accelerated rapidly in recent years.

Actual and official documentation is scarce for such cases. In many instances, newspaper reports or press releases are the only relevant information available, and journalists tend to use “popular” rather than canonical or legal language. In the following survey, attempts will be made to distinguish between reports and actual documentation but, in many cases, only press reports are available, and they must be used with caution.

1 — *Cardinals of the Roman Church*

Canon 1405 §1, 2° provides that the Roman Pontiff alone has the right to judge Cardinals. Recently, there have been three highly publicized cases concerning Cardinals accused of sexual abuse of minors.

Cardinal Hans Groër, Archbishop of Vienna, resigned on 14 September 1995 at the age of seventy-five. It was reported that he was ordered by Pope John Paul II in April 1998 “to give up his episcopal duties” and to leave Austria.³ He resigned his membership in the College of Cardinals, but there is no evidence that he was dispensed or deposed from the clerical state or released from his religious vows. Groër died on 24 March 2003.⁴

² Deacons and presbyters (rather than the more inclusive term “priests,” which usually includes both presbyters and bishops), on the other hand, are specifically named in *CIC* c. 290, 3° and *CCEO* c. 394, 3°. Bishops would, however, certainly be included within the meaning of “clerics” in the law, although until recently bishops were not treated in the same way as presbyters for either voluntary or involuntary loss of the clerical state.

³ ASSOCIATED PRESS, “Austrian Cardinal Quits in Sex Scandal,” in *New York Times*, New York Edition, 15 April 1998, A12.

⁴ AAS, 95 (2003), 296; cf. also “Groer, Hans Hermann,” in *Biographia Benedictina*, v. 13.10.2011, at <http://www.benediktinerlexikon.de/wiki>.

Under Pope Francis, Cardinal Keith O'Brien resigned as Cardinal, and the resignation was accepted on 20 March 2015.⁵ Cardinal O'Brien retained his title but was reduced to a strictly private life outside of Scotland. The resignation followed the 2014 decision by the pope to send a personal envoy, Archbishop Charles Scicluna, to Scotland to investigate the allegations. In this case, there does not appear to have been a formal trial but rather an extra-judicial procedure.⁶ Again, there is no evidence that O'Brien was dismissed or dispensed from the obligations of the clerical state, and he died on 19 March 2018.⁷

More recently, the Holy See announced that, in September 2017, "the Archdiocese of New York notified the Holy See that a man had accused former Cardinal [Theodore Edgar] McCarrick of having abused him in the 1970s. The Holy Father ordered a thorough preliminary investigation into this, which was carried out by the Archdiocese of New York, at the conclusion of which the relative documentation was forwarded to the Congregation for the Doctrine of the Faith. In the meantime, because grave indications emerged during the course of the investigation, the Holy Father accepted the resignation of Archbishop McCarrick from the College of Cardinals, prohibiting him by order from exercising public ministry, and obliging him to lead a life of prayer and penance."⁸ A press release from the Congregation for the Doctrine of the Faith (CDF) on 16 February 2019 recounted:

On 11 January 2019, the Congresso of the Congregation for the Doctrine of the Faith, at the conclusion of a penal process, issued a decree finding Theodore Edgar McCarrick, archbishop emeritus of Washington, D.C., guilty of

⁵ HOLY SEE PRESS OFFICE, "Comunicato stampa del Decano del Collegio Cardinalizio," 20 March 2015. "The Holy Father has accepted the resignation of the rights and privileges of a Cardinal, expressed in canons 349, 353 and 356 of the Code of Canon Law, presented by His Eminence Cardinal Keith Michael Patrick O'Brien, Archbishop Emeritus of Saint Andrews and Edinburgh, after a long period of prayer. With this provision, His Holiness would like to manifest his pastoral solicitude to all the faithful of the Church in Scotland and to encourage them to continue with hope the path of renewal and reconciliation." At <http://press.vatican.va/content/salastampa/it/bollettino/pubblico>.

⁶ John BINGHAM, "Pope Francis Strips Disgraced Cardinal Keith O'Brien of Privileges but Not Title," *The (London) Telegraph*, 20 March 2015. O'Brien's resignation as Archbishop of Edinburgh had been accepted on 18 February 2013, immediately before Pope Benedict XVI's resignation became effective. HOLY SEE PRESS OFFICE, "Rinuncia dell'Arcivescovo di Saint Andrews and Edinburgh," 25 February 2013, at <http://press.vatican.va/content/salastampa/it/bollettino/pubblico>.

⁷ Sam ROBERTS, [obituary] "Keith O'Brien, 80, Cardinal in Sex Scandal," in *New York Times*, New York Edition, 20 March 2018, B18.

⁸ HOLY SEE PRESS OFFICE, "Comunicato della Santa Sede," 6 October 2018, at <http://press.vatican.va/content/salastampa/it/bollettino/pubblico/2018>.

the following delicts while a cleric: solicitation in the Sacrament of Confession, and sins against the Sixth Commandment with minors and with adults, with the aggravating factor of the abuse of power. The Congresso imposed on him the penalty of dismissal from the clerical state. On 13 February 2019, the Ordinary Session (Feria IV) of the Congregation for the Doctrine of the Faith considered the recourse he presented against this decision. Having examined the arguments in the recourse, the Ordinary Session confirmed the decree of the Congresso. This decision was notified to Theodore McCarrick on 15 February 2019. The Holy Father has recognized the definitive nature of this decision made in accord with law, rendering it a *res iudicata* (i.e., admitting of no further recourse).⁹

Two points should be noted in these cases. First, each one was penal in nature, involving canon 1395. However, only in the last one was dismissal from the clerical state imposed as a penalty at the conclusion of the process. This case was made much more serious by the constellation of other delicts under investigation. Second, it appears that the provisions of canon 1405 §1 were preserved in the first two cases, since the actions were clearly by command of, and under the direct authority of, the Roman Pontiff. But, in the third case, the press release stated that the penalty of dismissal from the clerical state was “imposed by the Congresso” of the CDF and later confirmed by the Roman Pontiff. It may be argued that the Congregation is absolutely incompetent to proceed in this case, since cases involving Cardinals are exclusively reserved to the Roman Pontiff personally.¹⁰ The fact that this decision was confirmed by the Roman Pontiff personally, however, makes such an exception moot, even more so if this case was entrusted to the CDF by the Roman Pontiff, which would appear to be the case by the phrase, “The Holy Father ordered ... the relative documentation ... forwarded to the Congregation for the Doctrine of the Faith.”

2 — Other Bishops

In addition to these cases of Cardinals, there have been other cases of bishops having lost the clerical state. Some of these cases involve a voluntary return to the lay state. Others were the result of penal dismissal.

⁹ HOLY SEE PRESS OFFICE, “Comunicato della Congregazione per la Dottrina della Fede,” 16 March 2019, at <http://press.vatican.va/content/salastampa/it/bollettino/pubblico>.

¹⁰ In contrast, contentious cases involving bishops are reserved to the Roman Rota (c. 1405 §3); penal cases involving bishops are reserved to the Roman Pontiff (c. 1405 §1): “It is *solely* the right of the Roman Pontiff himself to judge ... cardinals; legates of the Apostolic See and, in penal cases, bishops” (emphasis added).

2.1 — Non-penal Cases

In the United States, two bishops in the mid-twentieth century not only resigned their office but also requested a dispensation from the clerical state, or even unilaterally renounced the episcopacy. In another highly publicised case, the Vatican granted a return to the lay state once the petitioner had been elected to civil office.

James Patrick Shannon was consecrated auxiliary bishop of Minneapolis-Saint Paul on 31 March 1965, and he became active in progressive politics. After Paul VI issued *Humanae vitae* in 1968, Shannon resigned as auxiliary bishop, “renounced” the episcopacy, married civilly, and was suspended.¹¹ Although the suspension is penal in nature, the resignation was voluntary, with no evidence that he had been pressured by the Holy See.

Bernard Matthew Kelly became auxiliary bishop of Providence, Rhode Island on 30 January 1964. He resigned from office over the Vietnam War in June 1971 and was reportedly returned to the lay state by the Holy See the following year.¹² No official document from the Holy See has ever been released indicating that either Shannon or Kelly had been dispensed from the obligations of the clerical state, although both received Catholic funerals and were reportedly “reconciled” with the Catholic Church.¹³

Fernando Armindo Lugo Méndez was ordained Bishop of San Pedro in Paraguay in 1994. On 18 December 2006, he submitted a petition to return

¹¹ Some sources state that Shannon “renounced his episcopacy,” as does Shannon himself in his autobiography *Reluctant Dissenter* (New York, Crossroad Publishing Company, 1998), which reproduces a copy of his letter of resignation. While this phrase is common in Anglican circles, it is without precedent in Catholic discourse. “Shannon died August 28, 2003 of a cerebral hemorrhage and was buried in Holy Name Cemetery in Medina, Minnesota.” Obituaries note that he was given a Catholic funeral and had been reconciled to the Catholic Church by the time of his death. Cf. the biographical note from the James P. Shannon Papers at the Minnesota Historical Society, at <http://www2.mnhs.org/library/findaids/00085.xml>.

¹² “In June 1971, the priests of the diocese received a letter informing us of his departure from the active ministry.” Rev. John A. KILEY, letter to *Providence* (R.I.) *Visitor*, December 2006. Kelly said his fellow bishops were “determined to preserve as far as possible the structures and forms of [the Council of] Trent” and were “more concerned about Communion in the hand than they are about the war in Vietnam.... Since discussion is impossible, I feel obligated in conscience to protest in the only way possible, by my resignation” (CATHOLIC NEW SERVICE, 5 December 2006). Both are found at <https://web.archive.org/web/20150123135238>.

¹³ “Ellen M. O’Hara, Chancellor of the Wheeling-Charleston diocese, said December 12, that Kelly was reconciled with the Catholic church ‘10 to 12 years ago’ and ‘died a faithful member’ of the Church of the Assumption.” Obituary from CATHOLIC NEWS SERVICE, 2006, reproduced at <https://www.findagrave.com/memorial/74209296/bernardmatthewkelly>.

to the lay state to the Holy See, in order to run for President of the Republic of Paraguay. This was initially refused in a letter of 4 January 2007 from Cardinal Re, Prefect of the Congregation of Bishops.

The juridic reduction to the lay state is granted by the Pope to deacons for grave reasons, to priests for very serious reasons (canon 290 §3), but never to the Bishops, inasmuch as the fullness of the priesthood received in the episcopal ordination obliges a maximum degree of fidelity to Christ and the Church throughout life, as it also obliges adherence to the obligations freely assumed in presbyteral ordination, and even more so in episcopal ordination... I am obliged to inform you that the Holy Father does not see the possibility of accepting the request for resignation of the clerical state presented by Your Excellency.

The letter was followed by a decree of the Congregation of Bishops of 20 January 2007 of suspension *a divinis*. “With this penal sanction you remain in the clerical state and continue to be bound by the duties inherent to it, though suspended in the exercise of the sacred ministry.”¹⁴ However, when Lujo was elected President of Paraguay on 20 April 2008, the Apostolic See did grant his laicization petition.¹⁵ The legality of Lugo’s candidacy had been questioned, because Paraguay’s *Constitución Política de 1992* forbids clerics from holding this elective office;¹⁶ the laicization thus settled any question of Lujo’s eligibility. For the Holy See to withhold the dispensation from the obligations of the clerical state could have been interpreted as an attempt to influence the election or to control the results of an election in an independent country.

2.2 — Penal Cases

According to canon 1405 §1, 3°, it is solely the right of the Roman Pontiff himself to judge Legates of the Apostolic See and bishops in penal cases. Within the last ten years, dismissal from the clerical state has been imposed as a penalty on several bishops.

¹⁴ The text of the letter and the decree, with an English translation, are provided as Appendices A and B below. The Spanish texts are taken from <https://studylib.es/doc>.

¹⁵ “Fernando Lugo, the former priest who is now the country’s president, shocked the nation last month [April 2009] by admitting to fathering one child — and possibly more — before the Vatican had returned him to layman status... Mr. Lugo continued to serve as a priest, offering Mass and administering the Sacrament, until at least December 2006, and Pope Benedict XVI did not grant Mr. Lugo status as a lay person until last July [2008], after the baby was born.” Alexei BARRIONUEVO, “Paternity Claims Make a Punch Line of Paraguay’s President, a Former Bishop,” in *New York Times*, New York Edition, 9 May 2009, A8.

¹⁶ Art. 235: *Son inhábiles para ser candidatos a Presidente de la República o Vicepresidente: ... 5. los ministros de cualquier religión o culto*: “[The following] are unable to be candidates for President of the Republic or Vice President: ... 5. the ministers of any religion or cult.”

Emmanuel Milingo, Archbishop of Lusaka in Zambia, was “reduced to the lay state,” according to the Holy See’s Press Office announcement of 17 December 2009. This occurred after he was excommunicated in 2006 for consecrating four men to the episcopacy without an apostolic mandate.¹⁷

On 12 March 2012,¹⁸ Raymond John Lahey, Bishop of Antigonish (Nova Scotia, Canada), was dismissed from the clerical state after being convicted of importing child pornography. Because he had pleaded guilty in criminal court and was sentenced, the Holy See considered a formal ecclesiastical trial superfluous.¹⁹ Among the conditions listed in the rescript were that Lahey remains bound by celibacy and by the obligation of praying the Divine Office in reparation for the scandal committed and for the sanctification of clergy.²⁰

¹⁷ “The commission of these grave crimes, which has recently been established, is to be considered as proof of the persistent contumacy of Archbishop Emmanuel Milingo. The Holy See has therefore been obliged to impose upon him the further penalty of dismissal from the clerical state. According to Canon 292 of the Code of Canon Law, the penalty of dismissal from the clerical state, now added to the grave penalty of excommunication, has the following effects: loss of the rights and duties attached to the clerical state, except for the obligation of celibacy; prohibition of the exercise of any ministry, except as provided for by Canon 976 of the Code of Canon Law in those cases involving danger of death; loss of all offices and functions and of all delegated power, as well as prohibition of the use of clerical attire. Consequently, the participation of the faithful in any future celebrations organized by Archbishop Emmanuel Milingo is to be considered unlawful. It must be pointed out that the dismissal of a Bishop from the clerical state is most extraordinary. The Holy See has felt obliged to act in this way due to the serious consequences for ecclesial communion resulting from repeated episcopal consecrations carried out without pontifical mandate; nevertheless, the Church hopes that Archbishop Milingo will see the error of his ways.” English original. HOLY SEE PRESS OFFICE, “Comunicato della Sala Stampa della Santa Sede, Dimissione dallo Stato Clericale de Emmanuel Milingo,” 17 December 2009, at <http://press.vatican.va/content/salastampa/it/bollettino/pubblico/2009>.

¹⁸ CDF, Prot. No. 316/2009.

¹⁹ “*Following the plea of guilty of the Most Reverend Raymond Lahey, former Bishop of Antigonish, Nova Scotia, the following statement has been issued by the Holy See Press Office: The Most Reverend Raymond Lahey, former Bishop of Antigonish, has pled guilty to possession of child pornography. The Catholic Church condemns sexual exploitation in all its forms, especially when perpetrated against minors. Although the civil process has run its course, the Holy See will continue to follow the canonical procedures in effect for such cases, which will result in the imposition of the appropriate disciplinary or penal measures.*” English original. HOLY SEE PRESS OFFICE, “Statement of the Holy See Press Office,” 4 May 2011; <http://press.vatican.va/content/salastampa/it/bollettino/pubblico>. Pope Benedict XVI had accepted Bishop Lahey’s resignation in accord with c. 401 §2 on 26 September 2009, at <http://press.vatican.va/content/salastampa/it/bollettino/pubblico/2009>.

²⁰ The 16 May 2012 statement of the CANADIAN CONFERENCE OF CATHOLIC BISHOPS stated, “On May 4, 2011, then Bishop Raymond Lahey entered a plea of guilty in civil court to the possession of child pornography. He was sentenced in accordance with civil law on January 4, 2012. It remained for the Holy See to follow the canonical procedures in effect for such cases to determine what appropriate disciplinary or penal measures would be imposed. The Canadian

Archbishop Józef Wesołowski was Apostolic Nuncio to the Dominican Republic from January 2008 until August 2013, when he was recalled and confined to his residence in Rome, awaiting a formal Vatican trial. Wesołowski was to be the first person to be tried by a Vatican criminal court on sex abuse charges. The Vatican Press Office announced on 27 June 2014 that the “first stage of the trial” had “ended in his laicization.”²¹ The first session of the trial had been scheduled for 11 July 2015, but it was postponed when Wesołowski was taken to the hospital after suffering “a collapse”; he remained in the hospital until 17 July. The Vatican court had not announced a date for the continuation of the trial when Wesołowski died on 27 August 2015 before the trial was completed.²² In its official statement about his

Conference of Catholic Bishops has now been informed by the Holy See that Raymond Lahey has been dismissed from the clerical state. According to Canon 292 of the Code of Canon Law, the penalty of dismissal from the clerical state has the following effects: loss of the rights and duties attached to the clerical state, except for the obligation of celibacy; prohibition of the exercise of any ministry, except as provided for by Canon 976 of the Code of Canon Law in those cases involving danger of death; loss of all offices and functions and of all delegated power, as well as prohibition of the use of clerical attire. Raymond Lahey has accepted the Decree of Dismissal, which also requires him to pray the Liturgy of the Hours in reparation for the harm and the scandal he has caused, and for the sanctification of clergy.” At <http://www.cccb.ca/site/eng/mediaroom/statements> and letters.

²¹ “Il primo grado di giudizio del processo canonico a carico dell’ex Nunzio Apostolico nella Repubblica Dominicana, Józef Wesołowski, si è concluso in questi giorni presso la Congregazione per la Dottrina della Fede con una sentenza di condanna alla dimissione dallo stato clericale. L’accusato ha ora due mesi di tempo per proporre eventuale appello. Il procedimento penale presso gli organi giudiziari vaticani proseguirà non appena sarà definitiva la sentenza canonica. Infine, con riferimento ad alcune notizie apparse recentemente sui mass media, si precisa che finora Mons. Wesołowski ha usufruito di una relativa libertà di movimento in attesa che la Congregazione per la Dottrina della Fede procedesse a verificare il fondamento delle accuse mosse a suo carico. Tenuto conto della sentenza ora pronunciata dal summenzionato Dicastero, saranno adottati nei confronti dell’ex Nunzio tutti i provvedimenti adeguati alla gravità del caso.” HOLY SEE PRESS OFFICE, “Canonical Trial of Ex Nuncio Jozef Wesołowski,” 27 June 2014, at <http://press.vatican.va/content/salastampa/it/bollettino/pubblico>. The Press Office issued a further statement in September 2014: “Today, the Promoter of Justice of the Court of First Instance of the Vatican City State summoned the former nuncio J. Wesołowski, on whom he had conducted a criminal investigation. The prelate — already judged in the first instance by the Congregation for the Doctrine of the Faith and reduced to the lay state at the end of canonical administrative penal process — was notified of the indictment of the criminal proceedings against him for serious acts of abuse of minors in the Dominican Republic.” English original. HOLY SEE PRESS OFFICE, 23 September 2014, at <http://press.vatican.va/content/salastampa/it/bollettino/pubblico/2014>.

²² “The President of the Tribunal of Vatican City State, Professor Giuseppe Dalla Torre del TemPIO di Sanguinetto, by decree of 6 June 2015 in response to the request submitted by the Office of the Promoter of Justice, has ordered the trial of the former apostolic nuncio to Dominican Republic, Józef Wesołowski. The first hearing of the trial is scheduled for 11 July 2015. The

death, the Vatican referred to him as “His Excellency Monsignor Jozef Wesółowski,” even though he had been dismissed from the clerical state more than a year earlier after an investigation by the CDF.²³

The former Archbishop in Guam, Archbishop Anthony Apuron, also had a formal Vatican trial. On 16 March 2018, it was announced that he had been convicted of unspecified offences by a Vatican Tribunal and was to be removed from office.²⁴ He appealed, and Pope Francis said in a press conference on the way back from Ireland the following August, “I decided—because it’s a very difficult case—to take the privilege that I have of taking on the appeal myself and not sending it to the council of appeal that does its work with all the priests. I took it upon myself.”²⁵ Nevertheless, the following press release was issued by the Vatican Press Office in March 2019.

As was announced on 16 March 2018, the Apostolic Tribunal of the Congregation for the Doctrine of the Faith concluded a First Instance canonical penal trial in the case of the Most Reverend Anthony Sablan Apuron, O.F.M.Cap. (Agaña, Guam). As was noted at the time, an appeal was possible and was in fact lodged. That appeal has been concluded. On 7 February 2019, the Tribunal of Second Instance upheld the sentence of First Instance finding the Archbishop guilty of delicts against the Sixth Commandment with minors. The penalties imposed are as follows: the privation of office;

ex-prelate is accused of a number of offences committed both during his stay in Rome from August 2013 until the moment of his arrest (on 22 September 2014) and in the period he spent in the Dominican Republic, during the five years in which he held the office of apostolic nuncio (he was appointed as nuncio to the Dominican Republic on 24 January 2008 and apostolic delegate to Puerto Rico, offices from which he resigned on 21 August 2013).” HOLY SEE PRESS OFFICE, “Comunicato: Rinvio a giudizio dell’ex Nunzio Józef Wesółowski,” 6 June 2015, at <http://press.vatican.va/content/salastampa/it/bollettino/pubblico/2015>.

²³ HOLY SEE PRESS OFFICE, “Comunicato della Sala Stampa: decesso di S.E. Mons. Józef Wesółowski,” 28 August 2015, at <http://press.vatican.va/content/salastampa/it/bollettino/pubblico/2015>.

²⁴ “The canonical trial in the matter of accusations, including accusations of sexual abuse of minors, brought against the Most Reverend Anthony Sablan APURON, O.F.M.Cap., Archbishop of Agaña, Guam, has been concluded. The Apostolic Tribunal of the Congregation for the Doctrine of the Faith, composed of five judges, has issued its sentence of first instance, finding the accused guilty of certain of the accusations and imposing upon the accused the penalties of privation of office and prohibition of residence in the Archdiocese of Guam. The sentence remains subject to possible appeal. In the absence of an appeal, the sentence becomes final and effective. In the case of an appeal, the imposed penalties are suspended until final resolution.” English original. HOLY SEE PRESS OFFICE, “Press Release from the Apostolic Tribunal of the Congregation for the Doctrine of the Faith,” 16 March 2018, at <http://press.vatican.va/content/salastampa/it/bollettino/pubblico/2018>.

²⁵ Text of Pope Francis’ in-flight press conference from Dublin, in CATHOLIC NEWS AGENCY, 26 August 2018, at <https://www.catholicworldreport.com/2018>.

the perpetual prohibition from dwelling, even temporarily, in the jurisdiction of the Archdiocese of Agaña; and the perpetual prohibition from using the insignia attached to the rank of Bishop. This decision represents the definitive conclusion in this case. No further appeals are possible.²⁶

In other situations, bishops have been requested to resign rather than become subject to penal sanctions or a formal canonical trial. For instance, on 11 October 2017, Pope Francis accepted the resignation of Bishop Hubertus Leting of Ruteng, Indonesia, who was accused of using diocesan funds to support a mistress.²⁷ On 8 August 2017, Bishop Valentine Tsamma Seane of Gaborone, Botswana, resigned after serious accusations of sexual abuse of religious sisters.²⁸ Likewise, under unexplained circumstances, Bishop Jean-Nöel Diduf of Tambacounda, Senegal, resigned from office.²⁹

3 — *Come una madre amerevole (2016) and Vos estis lux mundi (2019)*

Within the last several years, Pope Francis has issued two significant apostolic letters *motu proprio* containing procedures to be used in the investigation of cases involving the sexual abuse of minors. These documents establish new universal laws.

²⁶ HOLY SEE PRESS OFFICE, “Comunicato della Congregazione per la Dottrina della Fede,” 4 April 2019, English original at <http://press.vatican.va/content/salastampa/it/bollettino/pubblico/2019>. Note that dismissal from the clerical state was not one of the penalties imposed.

²⁷ ASSOCIATED PRESS, “Indonesia Bishop Resigns in Finance, Mistress Scandal,” in *New York Times*, Online edition, 11 October 2017, at <https://www.nytimes.com/aponline/2017/10/11/world/europe/ap-eurelvaticanindonesiabishop.html>. “In a surprise move, Bishop Hubertus Leteng, former bishop of Ruteng on Flores Island was reassigned to serve in Bandung Diocese in West Java.” See Ryan DAGUR, “Church Gives Scandal-hit Indonesian Bishop Second Chance,” in UCA NEWS, 12 December 2018, at <https://www.ucanews.com/news>. The notice of the acceptance of Leteng’s resignation and the appointment of an apostolic administrator *sede vacante et ad nutum Sanctae Sedis* was published on 11 October 2017. HOLY SEE PRESS OFFICE, “Rinuncia del Vescovo di Ruteng (Indonesia) e nomina dell’Amministratore Apostolico *sede vacante et ad nutum Sanctae Sedis*”; at <http://press.vatican.va/content/salastampa/it/bollettino/pubblico/2017>.

²⁸ HOLY SEE PRESS OFFICE, “Dimissioni del Vescovo di Gaborone (Botswana) e nomina dell’Amministratore Apostolico *sede vacante et ad nutum Sanctae Sedis*,” 8 August 2017, at <http://press.vatican.va/content/salastampa/it/bollettino/pubblico/2017>. Tsaone BASIMANE-BOTLHE, “Rome Admits Bishop Seane Resigned to Clear His Name,” in *The Monitor*, 14 August 2017, at <http://www.mmegi.bw/index.php?aid70939&dir2017/august/14>.

²⁹ HOLY SEE PRESS OFFICE, “Dimissioni del Vescovo di Tambacounda (Senegal) e nomina dell’Amministratore Apostolico *sede vacante et ad nutum Sanctae Sedis*,” 5 August 2017, at <http://press.vatican.va/content/salastampa/it/bollettino/pubblico/2017>.

In his apostolic letter *motu proprio Come una madre amorevole* (4 June 2016), Pope Francis established procedures for disciplining diocesan and eparchial bishops and major superiors of religious institutes and societies of apostolic life of pontifical right for “the negligence of a Bishop in the exercise of his office, and in particular in relation to cases of sexual abuse inflicted on minors and vulnerable adults.”³⁰ However, the only punishment described in this letter is removal from office. Since the norms are subject to a strict interpretation as a penal matter, deposition or dismissal from the clerical state would not appear to be possible as a result of these procedures.³¹

Following the meeting of the heads of Episcopal Conferences in February 2019, Pope Francis issued the apostolic letter *motu proprio Vos estis lux mundi* (7 May 2019).³² The norms, established *ad experimentum* for a period of three years, detail primarily the processes to be used in reporting clerics and members of institutes of consecrated life and societies of apostolic life concerning specified delicts against the sixth commandment of the Decalogue, or who avoid or interfere with civil or canonical investigations of such alleged delicts. No new penalties are established by this document, nor is the penalty of dismissal from the clerical state mentioned.

4 — Degradation of Bishops (CCEO c. 1433 §2)

Canon 1433 §2 of the *Code of Canons of the Eastern Churches* deals with the penal dismissal from the clerical state and lists the effects of deposition.

³⁰ FRANCIS, apostolic letter *motu proprio Come una madre amorevole*, in AAS, 108 (2016), 715. Art. 1 gives the grounds for possible removal: “§1. The diocesan Bishop or Eparch, or one who even holds a temporary title and is responsible for a Particular Church, or other community of faithful that is its legal equivalent, according to can. 368 CIC or can. 313 CCEO, can be legitimately removed from this office if he has through negligence committed or through omission facilitated acts that have caused grave harm to others, either to physical persons or to the community as a whole. The harm may be physical, moral, spiritual or through the use of patrimony.”

³¹ Ibid., no. 4 states: “Whenever the removal of a Bishop is held to be opportune, the Congregation, depending on the circumstances of the case, will establish whether: 1°. to issue, and in the briefest possible amount of time, a decree of removal; 2°. to fraternally exhort the Bishop to present his letter of resignation within a period of fifteen days. If the Bishop does not give his response within this period of time the Congregation can proceed to issue the decree of removal.” In AAS, 108 (2016), 716. Art. 5 continues: “The decision of the Congregation as stated in articles 3-4 must be submitted for the specific approval of the Roman Pontiff, who before making a definitive decision will take counsel with a special College of Jurists designated for this purpose.” In AAS, 108 (2016), 717.

³² The English text, along with various other translations, are found at <http://press.vatican.va/content/salastampa/it/bollettino/pubblico/2019/05/09/0390/00804.html#EN>.

This is in marked contrast to its counterpart in the *Code of Canon Law* (can. 1336 §1. 5°), which lists dismissal from the clerical state as the fifth and last in the list of expiatory penalties. The Eastern Code indicates that a cleric deposed from the clerical state “is prohibited from exercising the power of orders and ... is equivalent to lay persons in respect to canonical effects, with due regard for cann. 396 and 725.” The two exceptions at the end of the canon indicate that the obligation of celibacy would remain unless dispensed by the Roman Pontiff (can. 396), and a deposed presbyter or bishop could validly absolve a penitent in danger of death (can. 725). The canon speaks of a deposed cleric without any further distinction, and it would therefore include a deposed bishop.

The first paragraph of this same canon contains another penalty absent in the Latin Code, namely “reduction to a lower grade.”³³ Thus, for example, a presbyter may be reduced to the diaconate and, while he would not be equivalent in law to a layperson, he would be excluded from offices for which the presbyterate was a qualification and could not exercise those actions for which priestly orders are necessary. This canon does not indicate whether, if a cleric so penalised were to attempt an action “not consonant” with the grade of orders to which he had been reduced, that action would be valid or not. Since the canon does not explicitly indicate that such action would be invalid, it must be concluded that such action would be valid, but gravely illicit, since the actor would be prohibited from functioning in this way.³⁴ Although this penalty is not explicitly listed for any specific delict in the Eastern Code, the general canons on procedure note that this penalty cannot be imposed by an extra-judicial decree (*CCEO* can. 1402 §2), nor can it be imposed by a tribunal of fewer than three judges (*CCEO* can. 1084 §1. 3°).

Because of the inclusive application of the term *clericus*, this penalty would clearly apply to bishops who, without being completely deposed or dismissed from the clerical state, could be “reduced” to the presbyterate or diaconate as a penalty. Such a procedure would depend on the circumstances of the case. The law itself does not warrant such a penalty for any particular

³³ *CCEO* c. 1433 §1. “A cleric demoted to a lower grade is forbidden to exercise those acts of the power of order or governance which are not in accord with this grade.”

³⁴ The *coetus* on delicts and penalties, in drafting this canon, noted that the practise of the Orthodox Churches is to hold that “a cleric who is reduced to a lower grade can exercise only those offices and powers of orders or of governance that are consonant with the grade” to which he has been reduced. In *Nuntia*, 4 (1977), 88-89. After receiving responses from the various organs of consultation, however, the *coetus* reiterated the principle that orders once validly received never become null, and it reformulated the canon in the form in which it now appears. In *Nuntia*, 20 (1985), 39-40.

offense, and a cursory review of the sources produces no evidence of such a penalty being imposed on a bishop in recent history.³⁵

5 — *Deposition of Bishops in the Anglican Communion*³⁶

As a point of reference, it is useful to review the experience of other Western Churches with the historic episcopate to see how bishops who had left or who had been deposed from the ordained ministry have been dealt with. The foremost of these churches, both because of their similarities in ecclesiastical polity and because of common roots in and enduring practises from mediaeval canon law, are the churches of the Anglican Communion.

It is the common teaching of the churches of the Anglican Communion that holy orders are, by their nature, indelible, and no person who has been admitted to the order of bishop, priest, or deacon can ever be divested of the character of that order.³⁷ Nevertheless, a cleric, including a bishop, either may voluntarily relinquish the exercise of those orders or be prohibited from their exercise.³⁸ The prohibition of exercising orders may be temporary or perpetual.

³⁵ In the patristic period, however, the penalty was prescribed with regularity for delicts such as simony, conspiracy, heresy, fornication, and adultery. See cc. 2-6 of the COUNCIL OF EPHEBUS (431), CICO *Fonti*, fasc. 9, t. I, 1, Grottaferrata, S. Nilo, 1962, 58-61; cc. 2, 10, 12, 18, 22, 27, 29 of the COUNCIL OF CHALCEDON (451), CICO *Fonti*, fasc. 9, t. I, 1, 70f., 77f., 79f., 83f., 86, 90, 93f.; cc. 7, 20, 34, 92 of the COUNCIL IN TRULLO (692), in G. NEDUNGATT (ed.), *The Council in Trullo Revisited*, Kanonika 6, Rome, Pontificio Istituto Orientale, 1995, 76-79, 96, 112, 171f.; cc. 3 and 32 of SAINT BASIL, CICO *Fonti*, fasc. 9, t. 2, Grottaferrata, S. Nilo, 1963, 100f., 131; and cc. 2, 4-5, 7-9 of the FOURTH COUNCIL OF CONSTANTINOPLE (869-70), CICO *Fonti*, fasc. 9, t. I, 1, 295ff., 299-304, 306-310.

³⁶ I am grateful for assistance from the Christoph Keller, Jr. Library at The General Theological Seminary, in New York, NY, and particularly the reference librarian, Caitlin Stamm.

³⁷ "No person who has been admitted to the order of bishop, priest, or deacon can ever be divested of the character of his order, but a minister may either by legal process voluntarily relinquish the exercise of his orders and use himself as a layman, or may by legal and canonical process be deprived of the exercise of his orders or deposed therefrom." *Canons of the Church of England*, can. par. 2.

³⁸ "Relinquishment" (in the Church of England) or "renunciation" (in the Episcopal Church) is facilitated by deed, which relieves the person executing the deed from all disabilities, deprives him of all privileges, and restores him (in practical terms) to the status of a layman. For a fuller consideration of the nature of holy orders in the Anglican tradition (in an appeal in a deposition case in the Church of Wales), see *Williams v. Bishop of Bangor* (1999) 5, in *Ecclesiastical Law Journal* (=EccLJ) 304, Provincial Ct in Wales. Other provisions in the Church of England are found in the Clergy Discipline Measure 2003 (2003 n. 3, passed by the General Synod of the Church of England and received the royal assent on 10 July 2003). Deprivation and deposition

While deposition and renunciation were part of the disciplinary canons of the Protestant Episcopal Church in the United States of America from its foundation at the end of the eighteenth century, these canons explicitly referred to priests and deacons; bishops appeared to be excluded from their operation.³⁹ The absence of any provisions for the deposition of a bishop became acutely evident in the case of Levi Silliman Ives (1797-1867), second bishop of North Carolina (1831-1852). On 1 October 1852, Ives began a six-month leave of absence, departing for Europe with his wife. On 22 December 1852, he sent a letter to the Diocesan Convention of the Episcopal Church in North Carolina resigning his office as Bishop of North Carolina, in view of his decision to join the Roman Catholic Church.⁴⁰

remain as sanctions for offenses concerning doctrine, ritual, or ceremonial under the provisions of the Ecclesiastical Jurisdiction Measure 1963 (1963 n. 1, passed by The National Assembly of the Church of England to reform and reconstruct the system of ecclesiastical courts of the Church of England, to replace with new provisions the existing enactments relating to ecclesiastical discipline, and received the royal assent on 31 July 1963). Cf. Adrian ILES, "The Clergy Discipline Measure 2003: A Canter through Its Provisions and Procedures," in *EcclLJ* 9 (2007) 10-23. In effect, however, the clerical status of one who has relinquished his orders or been deprived or deposed is suspended, and can be reinstated without any further ordination, upon vacation of the deed or renunciation. The procedure to effect such a vacation is contained in the Clergy Disabilities Act 1870 (Amendment) Measure 1934 (1934 No. 1, 24 and 25 Geo 5, passed by the National Assembly of the Church of England to amend the Clerical Disabilities Act 1870 by enabling clerks in Holy Orders who have availed themselves of that Act to resume the position of officiating ministers; received the royal assent 22 June 1934). There are, however, examples of clerics who had been deposed in the Church of England being reordained upon reinstatement, almost all from the sixteenth and early seventeenth century.

³⁹ Since the diocesan bishop, acting in a judicial capacity, pronounced sentences of deposition of lower clergy, there was no obvious superior authority that could serve the same function in the case of a diocesan bishop who was found worthy of deposition, or even one who wished to relinquish not only his office but also his status.

⁴⁰ The letter of 22 December begins: "Some of you, at least, are aware that for years, doubts of the validity of my office as Bishop, have at times harassed my mind and greatly enfeebled my action ..." It concludes, "I am called upon therefore to do an act of self-sacrifice, in view of which all other self-sacrificing acts of my life are less than nothing—called upon to sever the ties, which have been strengthened by long years of love and forbearance—which have bound my heart to many of you as was David's to that of Jonathan—and make that heart bleed as my hand traces the sentence which separates all Pastoral relation between us—and conveys to you the knowledge that I hereby *resign* into your hands my office as Bishop of North Carolina,—and further, that I am determined to make my submission to the Catholic Church" (emphasis in the original). A pamphlet containing this, and other correspondence dealing with the foundation of the community at Valle Crucis, NC, the first religious order for men in the Anglican Communion since the Reformation, was published by a committee of the Diocesan Convention of the Diocese of North Carolina, *Statement of the Difficulties between the Diocese of North Carolina and Dr. Ives, Lately Bishop of Said Diocese, Prepared by a Committee Appointed by the Convention of 1853*, Fayetteville, NC, Edward J. Hale and Son, 1853, at 16-17.

He was received into the Roman Catholic Church in Rome by Pope Pius IX that Christmas.⁴¹

The House of Bishops, meeting the following autumn, was thrown into confusion. While the canons were clear about what was to be done for a deacon or a priest who had abandoned the communion of the Episcopal Church, there was no provision for dealing with a diocesan bishop.⁴² Title IV, canon 2 of the *Constitution and Canons*, however, provided that a bishop is amenable to a court of bishops, while presbyters and deacons are amenable for offenses committed to the ecclesiastical authority of the jurisdiction in which they are canonically resident.⁴³ The General Convention of 1853

⁴¹ For further biographical information, see H. G. BATTERSON, *A Sketch Book of the American Episcopate*, Philadelphia, J.B. Lippincott, 1878, 102-103. Some months later, his wife converted to Catholicism. He returned to New York in 1854 and spent the remainder of his life as a Roman Catholic layman. Ives was the only bishop to abandon the Episcopal Church over the Oxford Movement controversy. Oral tradition in the Diocese of North Carolina held that Ives handed over to Pius IX his episcopal ring and the seal of the Diocese of North Carolina. For almost the next century and a half, the Episcopal Bishop of North Carolina did not wear an episcopal ring.

⁴² It would appear that the most recent previous example of an Anglican bishop becoming Catholic prior to Ives was John Gordon (1644-1726), Bishop of Galloway, who was in the itinerant court of James II after the Glorious Revolution of 1688. Gordon became a Roman Catholic in France while in exile, under the influence of Bossuet, at the end of the seventeenth century. See J. QUINN, "The case of the convert bishop: John Clement Gordon 1644-1726," in *The Month*, n.s., 19 (1958), 102-107; Thompson COOPER (rev. Edward CORP), "Gordon, John [known as John Clement Gordon]," in *Oxford Dictionary of National Biography*, Oxford, Oxford University Press, 2004, at <https://doi.org/10.1093/ref:odnb/11065>.

⁴³ The House of Bishops enacted the following resolution: "Whereas, Levi Silliman Ives, D.D., Bishop of the Protestant Episcopal Church in the United States, in the Diocese of North Carolina, in a communication under his proper hand, bearing date, "Rome, December twenty-second, one thousand eight hundred and fifty-two," avowed his purpose to resign his "Office as Bishop of North Carolina," and further declared that he was "determined to make his submission to the Catholic," (meaning the Roman) "Church"; And whereas, there is before the Bishops of the Protestant Episcopal Church in the United States, acting under the provision of Canon First of 1853, satisfactory evidence that the said Levi Silliman Ives, D.D., has publicly renounced the communion of the Church, and made his submission to the Bishop of Rome, as Universal Bishop of the Church of God, and Vicar of Christ upon earth, thus acknowledging these impious pretensions of that Bishop, thereby violating the vows solemnly made by him the said Levi Silliman Ives, D.D., at his consecration as a Bishop of the Church of God, abandoning that portion of the flock of Christ committed to his oversight, and binding himself under anathema to the antichristian doctrines and practices imposed by the Council of Trent, upon all the Churches of the Roman Obedience. *Be it therefore known*, that on this fourteenth day of October, in the year of our Lord, One thousand, eight hundred and fifty-three, I, Thomas Church Brownell, D.D., L.L. D., by Divine permission, Bishop of the Diocese of Connecticut, and Presiding Bishop of the Protestant Episcopal Church in the United States, with the consent of a majority of the members of the

hastily enacted a canon in order to give some authority for the deposition of Bishop Ives,⁴⁴ and after the enactment of canon 1 “On the Abandonment of the Communion of the Church by a Bishop,” proceeded to depose Ives on 14 October 1853.⁴⁵

However, upon reflection, the bishops realised that although the newly enacted canon provided for a way out in the case of Ives, the canon’s language was not serviceable for other similar cases. The General Convention of 1859 in Richmond, Virginia revised the earlier canon and provided for communication between the Presiding Bishop and the bishop who appeared

House of Bishops, as hereinafter enumerated, ... and in the terms of the Canon in such case made and provided, do pronounce the said Levi Silliman Ives, D.D., *ipso facto* deposed to all intents and purposes from the Office of a Bishop in the Church of God, and from all the rights, privileges, powers and dignities thereunto pertaining. In the name of the Father, of the Son, and of the Holy Ghost. Amen! THOMAS CHURCH BROWNELL, Bishop of the Diocese of Connecticut, and Presiding Bishop.” In *Journal of the Proceedings of the Bishops, Clergy, and Laity of the Protestant Episcopal Church in the United States of America Assembled in a General Convention Held in Trinity Church and Saint John’s Chapel in the City of New York, ... 1853*, Philadelphia, King and Baird, 1854, 175f.

On the following day, this resolution was adopted: “*Resolved*, That the Presiding Bishop be respectfully requested to furnish each Bishop of the Church having charge of a Diocese, with an attested copy of the sentence of deposition pronounced upon the Rt. Rev. Dr. Ives, and that it shall be the duty of every such Bishop to cause said sentence to be publicly read in each congregation of his Diocese, by the respective ministers thereof.” In *Journal of the General Convention 1853*, 234.

⁴⁴ The canon read: “In all cases where a Bishop, Presbyter, or Deacon of this Church, without availing himself of the provisions of Canons 2 and 5 of 1850, has abandoned her Communion or shall hereafter abandon it, either by an open renunciation of the Doctrines, Discipline and Worship of this Church, or by a formal admission into any religious body not in Communion with the same: such Bishop, Presbyter, or Deacon shall be held, *ipso facto*, as deposed to all intents and purposes; and shall thereupon be pronounced deposed; if a Presbyter or Deacon, by the Bishop having jurisdiction, with the consent of the Standing Committee; and if a Bishop, by the Presiding Bishop, with the consent of the majority of the Members of the House of Bishops. And notice of such deposition shall be given as in like cases.” Canon 1 of the Canons of 1853, *Constitution and Canons for the Government of the Protestant Episcopal Church in the United States of America 1853*, 59, published as an appendix, with separate pagination, with the *Journal of the General Convention 1853*.

⁴⁵ “The House of Bishops entered the Church, the senior Bishops occupying the chancel, and the other Bishops standing without the rails. The House of Clerical and Lay Deputies stood to receive them. Appropriate Collects were said by the Right Rev’d the Bishop of Virginia. The Presiding Bishop then, sitting in his chair, while all persons in the House remained standing, solemnly declared the Deposition of Levi Silliman Ives, D.D., from the Office of a Bishop in the Church of God, rising as he closed the sentence, “in the Name of the Father, and of the Son, and of the Holy Ghost;” and all the people said “Amen.” The House of Bishops then retired.” In *Journal of the General Convention 1853*, 68.

to abandon the communion of the Episcopal Church.⁴⁶ Since a formal canonical trial was not envisioned in the previous canon, the revised canon introduced a process specifically for bishops and provided that a bishop abandoning the ministry be given a “cooling off” period of six months within which he might retract his declaration of abandonment. If no such retraction was made within the specified time, then the Presiding Bishop could, with the consent of a majority of the House of Bishops, proceed to a formal deposition.⁴⁷

On 10 November 1873, Bishop George D. Cummings, Assistant Bishop of Kentucky, addressed a letter to the Presiding Bishop, declaring his renunciation of the ministry of the Church. The Presiding Bishop, without calling a meeting of the House of Bishops, obtained the written consent of a majority of the bishops entitled to seats in the House of Bishops, proceeded to depose Cummings on 24 June 1874, and pronounced and recorded this deposition in the presence of two bishops.⁴⁸ It was questioned whether the

⁴⁶ Cf. *Journal of the Proceedings of the Bishops, Clergy, and Laity of the Protestant Episcopal Church in the United States of America Assembled in a General Convention Held in Saint Paul's Church in the City of Richmond, Virginia, ... 1859*, Philadelphia, King and Baird, 1860, 48, 106f., 144.

⁴⁷ “If any Bishop, without availing himself of the provisions of Section 16 of Canon 13 of Title I [relating to the resignation of a bishop], abandon the Communion of this Church, either by an open renunciation of the doctrine, discipline, and worship of this Church, or by formal admission into any religious body not in communion with the same, it shall be the duty of the Standing Committee of the Diocese to make certificate of the fact to the senior Bishop, which certificate shall be recorded, and shall be taken and deemed equivalent to a renunciation of the Ministry by the Bishop himself. Notice shall then be given to said Bishop by the said Bishop receiving the certificate, that unless he shall, within six months, make declaration that the facts alleged in said certificate are false, he will be deposed from the Ministry of this Church. And if such declaration be not made within six months as aforesaid, it shall be the duty of the senior Bishop with the consent of the majority of the House of Bishops, to depose from the Ministry the Bishop so certified as abandoning, and to pronounce and record, in the presence of two or more Bishops, that he has been so deposed. Provided, nevertheless, that if the Bishop so certified as abandoning, shall transmit to the senior Bishop a retraction of the acts or declarations constituting his offence, the Bishop may, at his discretion, abstain from any further proceedings.” Title II, canon 8, *Digest of the Canons of the Protestant Episcopal Church in the United States of America, together with The Constitution*, Philadelphia, King and Baird, 1860, 67f.

⁴⁸ George David Cumming, prior to his ordination in the Episcopal Church in 1845, had been a Methodist minister. A staunch opponent of ritualism and the Oxford Movement, he was criticised for both extending communion to and receiving communion from ministers of other Protestant denominations, and he resigned as bishop in 1873. He founded, and was the first presiding bishop of, the Reformed Episcopal Church. The principal doctrinal differences between this body and the Protestant Episcopal Church in the United States of America was the Reformed Episcopal Church's rejection of baptismal regeneration and apostolic succession

consent of the bishops so obtained was regular, the canon stating only that “the senior Bishop, with the consent of a majority of the House of Bishops” should depose. In order to remove any doubt as to the canonical deposition of Bishop Cummings, when the House of Bishops met in General Convention a few months later, it was resolved by that house: “That the action of the Senior Bishop in deposing the said George David Cummings, late Assistant Bishop of Kentucky, from the Ministry of this Church, be, and the same is hereby consented to, ratified and confirmed ... And the consent of a majority of the House of Bishops is hereby given that the said George David Cummings, late Assistant Bishop of Kentucky, be deposed from the Ministry of this Church.” In accordance with these resolutions of the House of Bishops, the Presiding Bishop did, on 17 October 1874, pronounce and record the sentence of deposition of Bishop Cummings.⁴⁹

While the former canon provided that the Presiding Bishop must obtain the consent of “a majority of the House of Bishops,” no provision was made for the calling of a meeting of the House of Bishops for that purpose. Also, no provision was made in the former canon for the suspension of the renouncing bishop, nor any provision made for the case of the senior bishop renouncing his ministry. It was to remedy these defects in the canon that amendments were enacted by the Convention of 1874. It was now provided by the amended canon that the Presiding Bishop, with the consent of the three bishops next in seniority,⁵⁰ should suspend the bishop renouncing his ministry until such a time as the House of Bishops might take action. In case the bishop abandoning his ministry is the senior bishop, provision was made that the bishop next in order of seniority should act as the Presiding Bishop for the purposes of the canon. To remove any doubts as to the necessity of calling a meeting of the House of Bishops, and to prevent a recurrence of any doubt as in the case of the Cummings deposition, the new canon provided that in case the offending bishop should not make a retraction and demand a trial within six months after notice to such bishop by the Presiding Bishop,

in the historic episcopate. See Annie Darling PRICE, *A History of the Formation and Growth of the Reformed Episcopal Church, 1873-1902*, Philadelphia, James M. Armstrong, 1902; Allen C. GUELZO, *For the Union of Evangelical Christendom: The Irony of Reformed Episcopalians*, University Park, PA, Penn State Press, 2010.

⁴⁹ *Journal of the Proceedings of the Bishops, Clergy, and Laity of the Protestant Episcopal Church in the United States of America Assembled in a General Convention Held in the City of New York, ... 1874*, Hartford, M. H. Mallory and Co., 1875, 267-268.

⁵⁰ The Presiding Bishop was initially the senior bishop by consecration in the Episcopal Church. In 1937, the office of Presiding Bishop was made elective, and section 1 of this canon was amended by changing the words “three Bishops next in seniority” to “three senior Bishops having jurisdiction in the United States.”

the Presiding Bishop should convene the House of Bishops and, if a majority of the whole number of bishops entitled to seats in the House of Bishops gave their consent, the Presiding Bishop was to proceed to depose the offending bishop. The amended canon also made it the duty of the abandoning bishop, if he desired to escape deposition, not only to make declaration that the facts alleged against him were false, but he must, at the same time, demand a trial.

Bishop Samuel A. McCrosky was consecrated as the first bishop of the Diocese of Michigan in 1836. After serving for over forty years, McCrosky cited ill health and resigned on 25 May 1878 at the age of 74. Charges of misconduct arose almost immediately, and McCrosky fled to Europe. By a unanimous vote of the House of Bishops of the Episcopal Church on 3 September 1878, he was deposed as Bishop of the Diocese of Michigan for “abandoning his diocese while under charges affecting his moral character.”⁵¹

Bishop Frederick J. Kinsman, Bishop of Delaware, resigned as bishop of that diocese in October 1919. Kinsman had been episcopal visitor of the Society of the Atonement, an Episcopal religious community founded in

⁵¹ “Bishop M’Crosky Deposed,” in *New York Times*, 4 September 1878. The full declaration of deposition, and a list of all of the names of the members of the House of Bishops present, was published in this article: “Judging from the tone of the article of deposition, it would appear that the House regarded his abandonment of his charge and his somewhat hurried departure for abroad as a tacit desire on his part to avoid an investigation of the charged preferred against him. Owing to his absence, the House found itself practically unable to conduct a proper and formal investigation, and it consequently took advantage of its right to depose him for leaving his diocese.” The House of Deputies reviewed the proceedings of the deposition at the next General Convention but declined to take any action: “Under Title II, Canon 9, of the Digest, a Bishop of this Church may be tried for crime or immorality, and suspended or deposed from the Ministry. The jurisdiction over such cases is in a court composed exclusively of Bishops to be selected as in said Canon provided. We are inclined to the opinion that the action of the Bishops, acting as a Court, although not organized in the manner prescribed by the Canon, may reasonably be regarded as that of a Court *de facto* and therefore *prima facie* valid. It would certainly be a very delicate matter, and as far as we know wholly unprecedented, for this House to sit in judgment upon the judicial action of the Bishop in a case in which the exclusive jurisdiction was with them, and in which under circumstances of great complication and difficulty, at the request of the party implicated, as is alleged, they proceeded in such manner as to them seemed wisest and best, and saved the Church from needless scandal and reproach. There was nothing in the course pursued by the Bishops that looks like an assumption of arbitrary power; and, if they erred at all, it was undoubtedly from an anxiety to dispose of the sad case before them with the least possible injury to the cause of sound morals and religion.” In *Journal of the Proceedings of the Bishops, Clergy, and Laity of the Protestant Episcopal Church in the United States of America Assembled in a General Convention Held in the City of New York, ... 1880*, Boston, Rand, Avery and Co., 1881, 164.

1898 which, in an unprecedented step, was received as a corporate body into the Roman Catholic Church in 1909. In 1918, he was one of the Anglican delegates at an ecumenical meeting with representatives of the Greek Orthodox Church in New York City.⁵² A special session of the House of Bishops was called in Saint Louis, Missouri on 27 October 1920 to consider Kinsman's resignation and subsequent abandonment of the communion of the Episcopal Church. "A committee having reported concerning the case of the former Bishop of Delaware, Dr. Kinsman was formally deposed from the sacred ministry of this church on September 27th, and his name was thereupon stricken from the roll of the House [of Bishops]. The Sentence of Deposition was pronounced by the Presiding Bishop in accordance with the form approved by the House of Bishops."⁵³

Bishop William Montgomery Brown, Bishop of Arkansas (1899-1912), was the first bishop to be tried for heresy or "teaching false doctrine" (principally Marxism⁵⁴) in the Anglican Communion since the Reformation. The House of Bishops' trial was spread out over two years and concluded with Brown's deposition in 1925.⁵⁵ Brown was courted by the Russian Orthodox Church, then under the control of Soviet authorities, and offered episcopal

⁵² "Kinsman Resigns as Delaware Bishop," in *New York Times*, 15 May 1919. Kinsman, who had been a professor at The General Theological Seminary in New York City before becoming Bishop of Delaware in 1908, was appointed professor of ecclesiastical history at The Catholic University of America after being received into the Roman Catholic Church in 1920. Kinsman described his story of conversation in an autobiographical apologia, *Salve Mater*, New York, Longmans, Green and Company, 1920.

⁵³ "Annual Cyclopedic of the Church," *The Living Church Annual 1922*, Milwaukee, Morehouse Publishing Company, 1922, 76

⁵⁴ The principal source of these charges was Brown's book, *Communism and Christianity: Banish Gods from Skies and Capitalists from Earth*, Galion, OH, The Bradford-Brown Educational Company, 1920.

⁵⁵ "The service was brief, with a few prayers; then came the announcement that Brown had been found guilty of heresy by the two trial courts and by the House of Bishops. Brown's name was then called three times; Brown's proxy, Theodore Schroder, a psychologist and an Old Catholic Theological professor, said nothing; and then Presiding Bishop Talbot solemnly deposed Brown in front of several bishops and a few hundred persons in the congregation. Later Bishop Talbot addressed the House of Bishops, saying that the ceremony had taken place. The House responded by removing Brown's name from the roll of bishops. Brown, who did not attend the ceremony, insisted that he was still a bishop in the Old Catholic Church, and that by its action the Episcopal Church had committed itself to extreme fundamentalism." John L. KEYSER, "The Deposition of Bishop William Montgomery Brown in New Orleans, 1925," in *Louisiana History*, 8 (Winter 1967), 42-50 at 50. The details of Brown's official deposition are in this article, but a fuller view of Bishop Brown's perspective on his deposition is in his letters and publications, See Ronald CARDEN, "The Bolshevik Bishop William Montgomery Brown's Path to Heresy, 1906-1920," in *Anglican and Episcopal History*, 72 (2003), 197-228.

consecration in that body; he instead joined the Old Catholic Church soon afterwards.⁵⁶

Following the narrow approval of the ordination of women and the first reading of the Draft Proposed Book of Common Prayer by the Minneapolis General Convention in September 1976, Albert A. Chambers, retired Bishop of Springfield (Illinois), began to assist traditional congregations in several dioceses, against the wishes, without the knowledge, or over the objections of the diocesan bishops of those dioceses. At their meeting at Port St Lucie, Florida, in October 1977, the House of Bishops adopted a resolution saying it “deplores and repudiates” his actions.⁵⁷ On 28 January 1978, Chambers and Bishop Francisco J. Pagtakhan, secretary for missions and ecumenical affairs of the Philippine Independent Catholic Church,⁵⁸ consecrated four new bishops for the breakaway Anglican Church of North America.⁵⁹ On 23 June 1978, fifteen bishops filed charges against Chambers for this consecration.⁶⁰ At a meeting of the House of Bishops the following October,

⁵⁶ “‘Heretic’ Bishop Brown Proposes a Religion for the Underworld,” in *The* (St Petersburg, FL) *Independent*, 14 January 1926, 12A. Brown was consecrated a bishop in the Old Catholic Church in his front parlour in Galion, Ohio before the publication of the sentence of deposition by the Episcopal House of Bishops. For details, and much more, of the trial and the evolution of Bishop Brown’s thought, see Ronald CARDEN, *William Montgomery Brown (1855–1937): The Southern Episcopal Bishop Who Became a Communist*, Lewiston, NY, Edwin Mellen Press, 2007.

⁵⁷ “The action ‘reaffirms ... respect for the episcopal authority of a bishop within his own diocese;’ ‘decries and repudiates’ Bishop Chambers’s ‘intervention into dioceses where he had been specifically requested not to officiate or not been authorized’ to officiate; ‘supports and sustains’ bishops of such dioceses; and ‘appeals’ to Bishop Chambers and other members of the House ‘to refrain’ from repeating such actions ‘in any diocese without the expressed approval’ of its bishop and ‘in any church no longer in communion with this Church, so long as he is a member of this House’.” In EPISCOPAL NEWS SERVICE, “Bishop Chambers’ Actions Decried and Repudiated,” 6 October 1977, at <https://episcopalarchives.org/cgi-bin/ENS/ENSpressrelease.pl?prnumber=77327>.

⁵⁸ Charles F. Boynton, retired suffragan bishop of New York, and Mark Pae, Bishop of Taejon, Korea, were scheduled to take part but were absent, the former because of severe heart trouble and the latter at the request of the Archbishop of Canterbury. Bishop Pagtakhan was a last-minute substitute.

⁵⁹ Bruce LAMBERT, “Albert A. Chambers, 86, Bishop Who Fought Women in Priesthood,” in *New York Times*, New York Edition, 20 June 1993, A38. For more extensive context, see Lawrence N. CRUMB, “The Extra-Canonical Ordination of Bishops and the Episcopal Church,” in *Anglican and Episcopal History*, 77 (2008), 402–413, esp. 406–408.

⁶⁰ EPISCOPAL NEWS SERVICE, “15 Bishops File Charges against Bishop Chambers,” 23 June 1978. “The charges which the 15 bishops — from 14 of the 18 dioceses of Province IV, located in the southeastern U.S. — presented to the Presiding Bishop are that Bishop Chambers violated the Constitution and Canons of the Episcopal Church as follows:

Bishop Chambers was censured for his actions, but fourteen of the then sixteen bishops who had signed the charges withdrew their signatures.⁶¹

However, these charges caused a major revision in the canon, the first since 1859. The first major amendment made in 1979 was the replacement of the words “or in any other manner” by the very specific Canon 9 section 1 (c).⁶² While the substitute language clearly describes the acts the amendment was designed to prohibit, the canon now lacks the “catch all” type of language which would prohibit other acts, not presently envisaged, which would nonetheless constitute abandonment.

The other major amendment removed from the standing committee of an offending bishop’s diocese the duty to certify the abandonment to the Presiding Bishop. Instead, this duty was assigned to the Advisory Committee to the Presiding Bishop, as provided for in the Rules of Order of the House of Bishops.⁶³ The reason for this change, presumably, was the situation that had arisen: Chambers was retired, and therefore did not have a diocesan standing committee which could take action. There was the obvious alternative of providing that the Advisory Committee would have the responsibility to certify in the case of

he participated in the consecration service without the Presiding Bishop or the President of Province VI—where the service took place—taking orders for the consecrations, and without the consents of the diocesan standing committees and other bishops of the Church (Canons: Title III, Canon 14, Section 1 [b] and [c]);

his episcopal act was done without the consent of Bishop William C. Frey of Colorado and without authorization of the House of Bishops or the Presiding Bishop (Canons: Title III, Canon 18, Section 9 (a) and (b); and Constitution: Article II, Section 3);

he “flagrantly breached” his own consecration vows to “conform to the Doctrine, Discipline, and Worship” of the Episcopal Church by participating in these “illegal episcopal acts” (Canons: Title IV, Canon 1, Section 1 [4] and [6]).”

https://episcopalarchives.org/cgi-bin/ENS/ENSpressrelease.pl?pr_number=78180.

⁶¹ The number who withdrew was sufficient to quash the charges, since a minimum of three bishops are required to proceed with a trial. EPISCOPAL NEWS SERVICE, “Bishop Chambers Censured; Charges Withdrawn,” 12 October 1978, at https://episcopalarchives.org/cgi-bin/ENS/ENSpress_release.pl?pr_number=78284.

⁶² Canon 9, section 1 (c): “by exercising episcopal acts in and for a religious body other than this Church, so as to extend to such body Holy Orders as this Church holds the same, or to administer on behalf of such religious body Confirmation without the express consent and commission of the proper authority in this Church.” The text in the 2015 *Constitution and Canons of the Episcopal Church* is Title IV.16(A).1(c).

⁶³ Now described in the *Rules of Order of the House of Bishops*, General Rules n. XXVII: “There shall be an Advisory Committee, composed of Bishops who are the Presidents or Vice-Presidents of each Province, which will act as advisory council to the Presiding Bishop between meetings of the House of Bishops. The Committee shall elect its own officers.” Although the Advisory Committee is referred to by several of the Constitution and Canons, its establishment and composition is regulated by a rule of order of the House of Bishops.

retired bishops, while the diocesan standing committee continued to retain jurisdiction in the case of bishops who were not retired. The result of the 1979 amendment is that only bishops are involved in the procedure of suspending and deposing a bishop who abandons the communion of the Episcopal Church.

Because Walter Cameron Righter, assistant bishop of Newark, signed a statement supporting the ordination of non-celibate homosexuals and ordained the Rev. Barry Stopfel as a deacon in 1990, ten bishops charged him in January 1995 with “holding and teaching ... doctrine contrary to that held by this church” under the so-called “heresy” canon, and with violating his ordination vows. On 15 May 1996, an Episcopal Church court dismissed charges against Righter, holding that neither the doctrine nor the discipline of the Church at that time explicitly prohibited the ordination of a homosexual. No penalty was imposed on Righter.⁶⁴

Clarence C. Pope, second bishop of the Episcopal Diocese of Forth Worth (1985-1994), resigned as bishop of that diocese on 31 December 1994 at the age of 65, and he was received into the Roman Catholic Church by Bernard Cardinal Law on 1 February 1995. No action was taken against Pope by the then Presiding Bishop of the Episcopal Church, Edmond Browning, and within the year Pope returned to the Episcopal Church.⁶⁵ Pope was received back into the Roman Catholic Church in 2007, but at his death on 8 January 2012, he was buried from his former church, St Luke’s Episcopal Church in Baton Rouge, Louisiana.⁶⁶ No action had been taken against him before his death by the General Convention or the House of Bishops of the Episcopal Church, or by the Episcopal Diocese of Fort Worth, for abandonment of the communion of the Episcopal Church.

David L. Moyer, President of Forward in Faith of North America, was deposed by the Bishop of Pennsylvania for refusing episcopal visits and for

⁶⁴ EPISCOPAL NEW SERVICE, “Court Dismisses Charges against Bishop Walter Righter over Ordination of Homosexual,” 23 May 1996, at https://www.episcopalarchives.org/cgibin/ENS/ENSpress_releasepl?pr_number=96-1467.

⁶⁵ “In August 1995 Pope withdrew his letter of resignation from the House of Bishops and returned to the Episcopal Church. At the time, he told the New York Times that he had a ‘growing unease’ with his decision because he would have to give up his episcopal orders to become a Roman Catholic priest. The House of Bishops had been scheduled to act on his resignation in September.” EPISCOPAL NEWS SERVICE, “Former Bishop Pope Dies in Baton Rouge Surrounded by Wife, Family,” 9 January 2012, at <https://www.episcopalnewsservice.org/2012>.

⁶⁶ “In August 2007, [Fort Worth Bishop Jack] Iker told his clergy that Pope had told him that he and his wife would be re-joining the Roman Catholic Church. Pope told Iker he had mailed a letter to Presiding Bishop Katharine Jefferts Schori informing her of his decision. During a subsequent House of Bishops meeting in New Orleans the next month, Jefferts Schori announced that Pope had voluntarily renounced his Episcopal Church orders.” *ibid*.

violating canonical discipline in “an open renunciation of the discipline of [the Episcopal] Church.” Although canonical discipline was cited as the immediate cause for this affair, the underlying causes were doctrinal, principally Moyer’s objections to the ordination of women as priests in the Episcopal Church. Moyer, while remaining as rector of The Church of the Good Shepherd in Rosemont, Pennsylvania, was consecrated a bishop in the Traditional Anglican Communion (TAC) on 16 February 2005. After protracted civil litigation, Moyer was evicted from the parish in Rosemont in 2011 and was received into the Roman Catholic Church in 2014. Because his episcopal ordination took place outside of Episcopal Church, and after his inhibition and deposition by Charles E. Bennison, Bishop of Pennsylvania in 2002,⁶⁷ the House of Bishops of the Episcopal Church did not recognise Moyer as one of its members, nor did it take any action upon his reception into the Catholic Church.

In 2007, Jeffrey N. Steenson, Bishop of Rio Grande (2005-2007), resigned as bishop and renounced his orders in the Episcopal Church. The Presiding Bishop, Katharine Jefferts Schori, accepted this renunciation and declared Steenson’s removal and renunciation on 14 January 2008.⁶⁸ Steenson was

⁶⁷ To complicate an already complicated case, an Episcopal Church court removed Charles Bennison as Bishop of Pennsylvania for his mishandling of his brother’s sexual abuse of a teenage girl many years before, when Bennison was a rector in California. On 3 October 2008, the Court for the Trial of a Bishop handed down its sentence, formally deposing Bennison from holy orders. Bennison later filed a motion seeking a reduction of his sentence, but in February 2009 the court upheld its decision to depose Bennison. Following the denial of a new trial, Bennison pursued his appeal to the Court of Review for the Trial of a Bishop, a separate court composed of nine bishops, which heard his case in Wilmington, Delaware on 4 May 2010; the basis for the appeal was a statute of limitation provision that had been in effect before a presentment charge had ever been filed. On 4 August 2010, the Court of Review reversed the trial court’s decision, and Bennison returned as Bishop of Pennsylvania. On 21 September 2010, however, the House of Bishops, meeting in Phoenix, Arizona, adopted a strongly-worded resolution urging Bennison to resign: “As the House of Bishops, we have come to the conclusion that Bishop Bennison’s capacity to exercise the ministry of pastoral oversight is irretrievably damaged. Therefore, we exhort Charles, our brother in Christ, in the strongest possible terms, to tender his immediate and unconditional resignation as the Bishop of the Diocese of Pennsylvania. For the sake of the wholeness and unity of the body of Christ, in the Diocese of Pennsylvania and in the church, we implore our brother to take this action without further delay.” PUBLIC AFFAIRS OFFICE, The Episcopal Church, “House of Bishops writes to Charles Bennison,” 22 September 2010, at <https://www.episcopalchurch.org/posts/publicaffairs>. On 9 October 2012, Bennison announced his retirement as Bishop of Pennsylvania.

⁶⁸ The text is provided in Appendix C below. It should be noted that the Presiding Bishop acted not according to the disciplinary canons of Title IV, but rather according to the “Release and Removal of a Bishop”: “If any Bishop of The Episcopal Church shall express, in writing, to the Presiding Bishop, an intention to be released and removed from the ordained Ministry of this Church and from the obligations attendant thereto, including those promises made at Ordination in the Declaration required by Article VIII of the Constitution of the

ordained to the priesthood in the Roman Catholic Church under the Pastoral Provision for married former Anglican clergy on 21 February 2009 in New Mexico, over a year after the renunciation of his Anglican orders, and he was named the first Ordinary of the Personal Ordinariate of the Chair of Saint Peter (for the United States and Canada) by Pope Benedict XVI on 1 January 2012.⁶⁹

Heather E. Cook, Suffragan Bishop of the Episcopal Diocese of Maryland, was convicted in 2015 of causing a car-bicycle accident in Baltimore in December 2014 that killed cyclist Thomas Palermo. Maryland Bishop Eugene Taylor Sutton placed Cook on administrative leave shortly after the accident, and the Presiding Bishop, Katherine Jefferts Schori, restricted Cook's ministry on 10 February 2015.⁷⁰ On 1 May 2015, the Presiding Bishop published the following announcement: "Pursuant to Title IV of the

General Convention, it shall be the duty of the Presiding Bishop to record the matter. The Presiding Bishop, being satisfied that the person so declaring is acting voluntarily and for causes, which do not affect the person's moral character, and is neither the subject of information concerning an Offense that has been referred to an Intake Officer nor a Respondent in a pending disciplinary matter as defined in Title IV of these Canons, shall lay the matter before the Advisory Council to the Presiding Bishop, and with the advice and consent of a majority of the members of the Advisory Council, the Presiding Bishop may pronounce that person is released and removed from the ordained Ministry of this Church and from the obligations attendant thereto, and is deprived of the right to exercise in The Episcopal Church the gifts and spiritual authority as a Minister of God's Word and Sacraments conferred in Ordinations. The Presiding Bishop shall also declare in pronouncing and recording such action that it was for causes which do not affect the person's moral character, and shall, at the person's request, give a certificate to this effect to the person so released and removed from the ordained Ministry." Title III, canon 12, sec. 7 (a), *Constitution and Canons of the Episcopal Church* (2006). The language of this canon (Title III, canon 12, sec. 7) is echoed in the Presiding Bishop's declaration (sec. 7[c]), rather than the more stringent tones of the canon on the abandonment of the communion of the Episcopal Church (Title IV, canon 9). In fact, renunciation and removal would not have been an option if proceedings had been initiated concerning a disciplinary offense prior to the renunciation. What exactly "release and removal from the ordained ministry" actually means is not clear, particularly given the tradition of the indelible sacramental character of ordination.

News reports noted that three other bishops of the Episcopal Church, in addition to Steenson, were removed from the episcopate around the same time, suggesting that laicisation was becoming routine, if not common.

⁶⁹ HOLY SEE PRESS OFFICE, "Erezione dell'Ordinariato Personale di *The Chair of Saint Peter* e Nomina del Promo Ordinario," 1 January 2012, at <http://press.vatican.va/content/salas-tampa/it/bollettino/pubblico/2012>.

⁷⁰ "This restriction is being placed upon your ordained ministry because information has been received by the Intake Officer that indicates that you may have committed one or more offenses under Canon IV.4 as a result of your alleged criminal conduct in connection with an automobile accident on December 27, 2014 and misrepresentations you allegedly made to persons in the Diocese of Easton and in connection to your candidacy for the episcopate in the Diocese of Maryland regarding your experience with alcohol."

Canons of The Episcopal Church, the Presiding Bishop and Bishop Cook have reached an Accord. Under the terms of the Accord, Bishop Cook will receive a Sentence of Deposition, pursuant to which she shall be ‘deprived of the right to exercise the gifts and spiritual authority of God’s word and sacraments conferred at ordination.’ As such, Cook will no longer function as an ordained person in The Episcopal Church. The Accord resolves all ecclesiastical disciplinary matters involving Cook. This Accord is separate from any resolution of employment matters involving Cook and the Diocese of Maryland as well as from criminal matters pending in the secular courts.”⁷¹

Two startling facets, at least for those familiar with the canonical tradition of the Anglican Communion, stand out in this case. The first is the use of a fairly recent procedure known as an “Accord” instead of a formal trial;⁷² this has more in common with arbitration and administrative procedures than it does with judicial proceedings. It may appear to be a voluntary agreement, although the opportunities for coercion, against which judicial procedures serve as a safeguard, are also evident. The second is the repeated reference in press releases and news articles to Bishop Cook as “an employee of the Diocese of Maryland.”⁷³ This is, at least to Catholic sensibilities, *male sonans*, if not offensive to pious ears, and appears to reduce the episcopacy

⁷¹ On the same day, the Diocese of Maryland put out the following announcement: “The Rt. Rev. Eugene Taylor Sutton and the Standing Committee of the Episcopal Diocese of Maryland today announced the acceptance of the resignation of Heather E. Cook as bishop suffragan of the Episcopal Diocese of Maryland. This means that Cook is no longer employed by the diocese. The acceptance of Cook’s resignation is independent of any Title IV disciplinary action taken by the Episcopal Church.” At <https://www.episcopalchurch.org/library/article9>. “Cook pleaded guilty to the charges — including automobile manslaughter, drunken driving, texting while driving and leaving the scene of a collision — in 2015,” and served three and a half years in prison. Jonathan M. PITTS, “Ex-bishop Heather Cook to Be Released Next Month after Serving Half Her Prison Sentence for Bicyclist’s Death,” in *Baltimore Sun*, 30 April 2019, at <https://www.baltimoresun.com/news/maryland/baltimore-city>. “Heather Cook was released about 10 a.m. Tuesday [14 May] from the Maryland Correctional Institution for Women in Jessup, according to the Maryland Department of Public Safety and Correctional Services”: WBAL-TV, “Former Episcopal bishop Heather Cook Released from jail,” 14 May 2019, at <https://www.wbalv.com/article>.

⁷² “**Accord** shall mean a written resolution, which is negotiated and agreed among the parties resulting from an agreement for discipline under Canon IV.9, conciliation under Canon IV.10 or a Conference Panel proceeding under Canon IV.12.” Title IV, canon 2, *Constitution and Canons of the Episcopal Church* (2015).

⁷³ “This means that Cook is no longer employed by the diocese,” Statement from the Diocese of Maryland. “In late January, the Maryland Standing Committee and [Bishop Eugene Taylor] Sutton asked Cook to resign as an employee of the diocese,” in *ibid*. Cf. Mary Frances SCHJONBERG, “Dual Actions End Heather Cook’s Ordained Ministry, Employment,” Episcopal News Service, 1 May 2015, at <https://www.episcopalchurch.org/library>.

from a vocation to a job. While it would appear that the purpose of such declarations is to shield the diocese from liability, it remains to be seen how this language is consonant with a traditional understanding of the historic episcopate.

Conclusion

The deposition of a bishop, which was considered impossible not all that long ago, has become, if not common, at least regular within the last few years. In the Roman Catholic Church, it has almost always been connected with sexual misconduct, and despite the provisions of canon 1405 §1, it has routinely been imposed by a decree of the CDF rather than by the Roman Pontiff. It appears to be imposed in cases in which the alleged delict is made more serious by other aggravating factors or behaviours. Return to the lay state definitely seems to be a last resort when other penalties or actions, such as resignation or privation of office, are not available or acceptable. Because of the relatively recent series of such penal actions and their exceptional nature, there is no jurisprudence or even pattern concerning when this penalty is imposed on a bishop and when some other penalty is used.

While there are significant similarities between the way laicisation of bishops has been handled in the Roman Catholic Church and within the Anglican Communion, particularly in the Episcopal Church, there are a number of obvious differences. Here, too, until about 150 years ago, there was no possibility of dismissal from the episcopal state—so much so, that when a bishop left the Episcopal Church entirely, the House of Bishops lacked any precedents to make determinations on how to proceed. In the intervening century and a half, the reasons for renunciation of or dismissal from the episcopacy have been various. While the most frequent cause has been abandonment of the communion of the Church, there have also been cases of heresy, negligence and, recently, being subject to a civil lawsuit. It has been used with increasing frequency over the last decade, and despite instances in which it has been voluntary, the norm appears to be that it is imposed.

In both churches, it is clear that a sea change has occurred, and it is impossible to go back to an understanding of the episcopal office and character whereby a return to the lay state is considered to be impossible. As happens frequently with canonical and particularly penal matters, legal decisions are taken for clear, compelling, and understandable reasons, while theology is relegated to a breathless sprint to catch up and supply justifications.

Appendix A⁷⁴

Vaticano, 4 de enero de 2007

A su Excelencia **Mons. Fernando Lugo Méndez, S.V.D.**

Obispo Emérito de San Pedro

Excelencia:

El Santo Padre ha recibido su carta del 18 de diciembre de 2006, con la cual Usted exponía su intención de aceptar la candidatura a Presidente de la República de esa Nación, que le ha sido ofrecida por un movimiento formado por varios partidos políticos.

Con el fin de superar la disposición de la Constitución Republicana que inhabilita los ministros de cualquier culto a ser Presidente o Vicepresidentes de Paraguay, Vuestra Excelencia ha presentado al Santo Padre la “renuncia al ministerio eclesial”, “a los derechos, deberes y privilegios del estado clerical”, “para retornar a la condición de laico en la Iglesia”.

Usted fue nombrado Obispo por el Sumo Pontífice en 1994, y libremente aceptó el nombramiento y recibió la consagración episcopal. Como Usted bien sabe, la gracia de la consagración episcopal imprime en el Obispo el carácter sacramental que lo configura interiormente a Cristo Buen Pastor, para ser en la iglesia maestro, sacerdote y guía espiritual. El episcopado es un servicio aceptado libremente para siempre. La tarea de un Obispo es estar al lado de los fieles siguiendo en todo la suprema ley de la Iglesia que es efectivamente la salvación de las almas y no el gobierno de la comunidad política.

La colaboración del Obispo en procurar el bien de la sociedad civil debe ser desempeñada siempre en modo pastoral, actuando como padre, hermano y amigo y ayudando con su ministerio a construir caminos de justicia y de reconciliación, como está justamente subrayado por la Exhortación Apostólica “Pastores gregis”.

The Vatican, 4 January 2007

His Excellency **Mgr. Fernando Lugo Méndez, S.V.D.**

Bishop Emeritus of San Pedro

Your Excellency:

The holy Father has received your letter of 18 December 2006, in which you express your intention to stand as a candidate for President of the Republic of Paraguay, which has been offered by a movement formed by various political parties.

In order to overcome the provision of the Constitution which disqualifies the ministers of any denomination from being President or Vice President of Paraguay, your Excellency has presented to the Holy Father the “renunciation of ecclesial ministry,” “from the rights, obligations and privileges of the clerical state,” “to return to the lay state in the Church.”

You were named bishop by the Supreme Pontiff in 1994, and freely accepted the nomination and received episcopal consecration. As you well know, the grace of episcopal consecration imprints the sacramental character on the bishop which configures him interiorly to Christ the Good Shepherd, to be in the Church a teacher, priest and spiritual guide. The episcopacy is a permanent freely accepted service. The role of a bishop is to be at the side of the faithful, totally following the supreme law of the Church which is effectively the salvation of souls and not the government of the political community.

The Bishop’s collaboration in procuring the good of civil society must always be carried out in a pastoral way, acting as father, brother and friend and helping with his ministry to build paths of justice and reconciliation, as justly stressed by the Apostolic Exhortation “Pastores gregis.”

⁷⁴ The Spanish texts are taken from <https://studylib.es/doc>. English translation by the author.

A la luz de tales consideraciones, usted comprende cuánto el servicio de un Obispo sea diverso de aquel de quien desempeña funciones políticas. Usted justamente observa que también la política es una forma de caridad, pero ella tiene un rol, leyes y finalidades propias, bien distintas de la misión de un Obispo, llamado a iluminar con el Evangelio todos los ámbitos de la sociedad y a formar las conciencias.

Tarea del Obispo es la de anunciar la esperanza cristiana, para defender la dignidad de cada hombre, para tutelar y proclamar con firmeza aquellos valores, que el Santo Padre ha definido “no negociables”. Durante la historia, y también hoy, numerosos Obispos han debido luchar y sufrir para conservar la propia libertad de Pastores ante toda forma de poder, para ser únicamente al servicio de Jesucristo y de su Evangelio.

Usted cita el canon 287 §2 del Código de Derecho Canónico para poder asumir directamente el empeño político, pero la excepción a la prohibición general prevista en tal canon no es aplicable a su caso: Paraguay de hecho es una nación libre y democrática y la Iglesia – cuyos derechos se respetan – está presente con un laicado comprometido, serio y motivado, capaz de asumir las propias responsabilidades en cada sector social, incluido el de la política.

La candidatura política de un Obispo sería un motivo de confusión y de división entre los fieles, una ofensa al laicado y una “clericalización” de la misión específica de los laicos y de la misma vida política.

La Santa Sede por lo tanto no ve la existencia de una justa y razonable causa, exigida por el canon 90 para conceder la dispensa por Usted solicitada. En su carta, citando el canon 187, Vuestra Excelencia “renuncia al ministerio eclesial” para “retornar a la condición de laico en la Iglesia”. Dicho canon no es congruente con su solicitud, en cuanto se refiere a la renuncia “a un oficio eclesiástico”, que es algo muy diverso del estado de vida clerical originado en la sagrada ordenación. Usted sabe bien que la sagrada ordenación una vez recibida válidamente no puede ser nunca anulada y no puede ser ni siquiera suspendida “ad tempus”, en cuanto al Sacramento del Orden imprime un carácter indeleble (canon 1008) y permanente.

In light of such considerations, you understand how much the service of a bishop is different from that of someone who performs political functions. You correctly observe that politics is also a form of charity, but it has a role, laws and purposes of its own, very different from the mission of a bishop, called to enlighten all spheres of society with the Gospel and to form consciences.

The task of the bishop is to announce Christian hope, to defend the dignity of each person, to protect and firmly proclaim those values, which the Holy Father has defined as “non-negotiable.” Throughout history, and also today, many Bishops have had to struggle and suffer to preserve the freedom of Pastors before any form of power, to be only at the service of Jesus Christ and his Gospel.

You cite canon 287 §2 of the Code of Canon Law to be able to directly assume the political commitment, but the exception to the general prohibition provided for in that canon is not applicable to your case: Paraguay is in fact a free and democratic nation and the Church—whose rights are respected—is present with a committed, serious and motivated laity, capable of assuming their own responsibilities in each social sector, including that of politics.

The political candidacy of a bishop would be a source of confusion and division among the faithful, an offense to the laity and a “clericalization” of the specific mission of the laity and of political life itself.

The Holy See therefore does not see the existence of a just and reasonable cause, required by canon 90 to grant the dispensation requested by you. In your letter, quoting canon 187, Your Excellency “renounces the ecclesial ministry” to “return to the condition of a lay person in the Church.” This canon is not congruent with your request, inasmuch as it refers to renunciation “of an ecclesiastical office”, which is something very different from the state of clerical life originating in sacred ordination. You know well that sacred ordination once validly received can never be annulled and cannot even be temporarily suspended, because the Sacrament of Order imprints an indelible and permanent character (canon 1008).

La reducción jurídica al estado laical viene concedida por el Papa a los diáconos por motivos graves, a los presbíteros por motivos gravísimos (cfr. can. 290 §3), pero nunca a los Obispos, en cuanto la plenitud del sacerdocio recibido en la ordenación episcopal obliga en grado máximo a la fidelidad a Cristo y a la Iglesia por toda la vida, como también obliga a la coherencia con las obligaciones libremente asumidas en la ordenación presbiteral, y aún más en la ordenación episcopal.

Vuestra Excelencia en su carta afirma de haber sopesado sus decisiones a la luz de su conciencia.

Precisamente a ella quiero apelar recordando que la conciencia debe ser recta e iluminada. Una decisión tan grave, que se refiere a su ser como Obispo en la Iglesia Católica no puede prescindir de las razones anteriormente expuestas. **Cumplo el deber de comunicarle que el Santo Padre no ve posible acoger la solicitud de dimisión del estado clerical** presentada por Vuestra Excelencia.

Recurriendo a su sentido de responsabilidad y de obediencia al Papa, ruego por Usted, confiado en la intercesión de la Santísima Virgen María y espero que Cristo Buen Pastor lo ilumine para que pueda permanecer fiel a su vocación divina y a su misión apostólica.

Giovanni Battista Re, Prefeto

The legal reduction to the lay state is granted by the Pope to deacons for grave reasons, to priests for very serious reasons (canon 290 §3), but never to bishops, inasmuch as the fullness of the priesthood received in episcopal ordination obliges a maximum degree of fidelity to Christ and the Church throughout life, as it also obliges adherence to the obligations freely assumed in presbyteral ordination, and even more so in episcopal ordination.

Your Excellency in your letter affirms that you have weighed your decisions in the light of your conscience.

It is precisely to this I want to appeal, remembering that conscience must be right and enlightened. Such a serious decision, which refers to you being a bishop in the Catholic Church, cannot do without the reasons set forth above. **I fulfil the duty to inform you that the Holy Father does not see the possibility of accepting the request for resignation from the clerical state** presented by Your Excellency.

Drawing on your sense of responsibility and obedience to the Pope, I pray for you, trusting in the intercession of the Blessed Virgin Mary and I hope that Christ the Good Shepherd will enlighten you so that you can remain faithful to your divine vocation and your apostolic mission.

Giovanni Battista Re, Prefect

Appendix B⁷⁵

CONGREGATIO PRO EPISCOPIS
SUSPENSIÓN A DIVINIS DE S. E. MONS. FER-
NANDO LUGO MENDEZ, S.V.D.
OBISPO EMÉRITO DE SAN PEDRO
DECRETO

El 21 de diciembre de 2006 el Nuncio Apostólico en Paraguay le ha consignado el texto de la Amonestación canónica que lo invitaba a no aceptar la candidatura a Presidente de la República de Paraguay, advirtiéndole que en caso contrario le sería impuesta – como primer paso – la pena canónica de la suspensión, que prohíbe a los ministros sagrados todos los actos de potestad de orden y de jurisdicción (can. 1333 §1).

Considerando que el 25 de diciembre de 2006, solemnidad de la Natividad del Señor, Vuestra Excelencia ha declarado públicamente ponerse a disposición de encargos políticos o institucionales y hasta ahora no ha cambiado su decisión, con sincero dolor cumplo el deber de infligir a Vuestra Excelencia, mediante el presente Decreto, la pena de la suspensión a *divinis*, a norma del canon 1333 §1, con la prohibición de poner en ejecución todos los actos de potestad de orden y de gobierno y el ejercicio de todas las funciones y derechos inherentes al oficio episcopal.

Con esta sanción penal Usted permanece en el estado clerical y continúa estando obligado a los deberes a él inherentes, aunque suspendido en el ejercicio del ministerio sagrado.

Confío en que Vuestra Excelencia retirará su decisión de ser fiel a las obligaciones libremente asumidas con la consagración episcopal.

Dado en la Ciudad del Vaticano, en la sede de la Congregación para los Obispos, el 20 de enero de 2007.

✠Giovanni Battista Cardenal Re
 Prefecto de la Congregación para los Obispos

✠Francisco Monterisi
 Secretario de la Congregación

CONGREGATION FOR BISHOPS
SUSPENSION A DIVINIS OF H.E.MONS.
FERNANDO LUGO MENDEZ, S.V.D.
BISHOP EMERITUS OF SAN PEDRO
DECREE

On 21 December 21 2006, the Apostolic Nuncio in Paraguay gave you the text of the canonical admonition inviting you not to accept the candidacy for President of the Republic of Paraguay, warning you that otherwise the canonical penalty of suspension would be imposed on you—as a first step—which forbids sacred ministers from all acts of power of orders and jurisdiction (canon 1333 §1).

Considering that on December 25, 2006, Solemnity of the Nativity of the Lord, Your Excellency has publicly declared himself to be available to political or institutional orders and so far has not changed this decision, with sincere sorrow I fulfil the duty to impose on Your Excellency, by means of this decree, the penalty of suspension *a divinis*, in accordance with canon 1333 §1, with the prohibition of performing all acts of the power of orders or of governance, and of the exercise of all functions and rights which are part of the episcopal office.

With this penal sanction you remain in the clerical state and continue to be bound by the duties inherent to it, although suspended in the exercise of the sacred ministry.

I trust that Your Excellency will reconsider your decision, and be faithful to the obligations freely assumed with episcopal consecration.

Given at Vatican City, at the offices of the Congregation for Bishops, on 20 January 2007.

✠Giovanni Battista, Cardinal Re
 Prefect of the Congregation of Bishops

✠Francisco Monterisi
 Secretary

⁷⁵ Original Spanish text at <https://studylib.es/doc>. English translation by the author.

Appendix C⁷⁶

THE EPISCOPAL CHURCH

The Most Reverend Katharine Jefferts Schori

Presiding Bishop and Primate

January 14, 2008

Renunciation of Ordained Ministry and Declaration of Removal and Release

In accordance with Title III, Canon 12, Section 7 of the Constitution and Canons of the Episcopal Church, and with the advice and consent of the Advisory Committee to the Presiding Bishop, I have accepted the renunciation of the Ordained Ministry of this Church, made in writing to me December 1, 2007 by:

**The Right Rev. Jeffrey N. Steenson
Bishop of the Rio Grande, Resigned**

Who is, therefore, removed from the Ordained Ministry of this Church and released from the obligations of all Ministerial offices, and is deprived of the right to exercise the gifts and spiritual authority as a Minister of God's Word and Sacraments conferred on him in Ordination.

This action is taken for causes that do not affect his moral character.

/s/ The Most Reverend Katherine Jefferts Schori

XXVI Presiding Bishop

(The Right Revd.) C. Christopher Epting (Deputy for Ecumenical and Interreligious Relations)

Episcopal Witness

(The Right Revd.) F. Clayton Matthews (Office of Pastoral Development)

Episcopal Witness

⁷⁶ “In the case of the release and removal of a Bishop from the ordained Ministry of the Church as provided in this Canon, a declaration of removal and release shall be pronounced by the Presiding Bishop in the presence of two or more Bishops, and shall be entered in the official records of the House of Bishops and of the Diocese in which the Bishop being removed and released is canonically resident. The Presiding Bishop shall give notice thereof in writing to the Secretary of the Convention and the Ecclesiastical Authority and the Standing Committee of the Diocese in which the Bishop was canonically resident, to all Bishops of this Church, the Ecclesiastical Authority of each Diocese of this Church, the Recorder, the Secretary of the House of Bishops, the Secretary of the General Convention, The Church Pension Fund, and the Board for Transition Ministry.” Title III, canon 12, section 7 (c), *Constitution and Canons of the Episcopal Church* (2006).

RECENSIONS – BOOK REVIEWS

D'AURIA, Andrea, *Il timore grave nell'attuale legislazione canonica*, 2nd rev. ed., Percorsi culturali, 28, Città del Vaticano, Urbaniana University Press, 2020, 151 p. – ISBN 978-88-401-5061-1 – € 15

This excellent short study of the effect of grave fear (*metus gravis*) upon juridic acts in the *ius vigens* offers a concise overview of the entire subject from a Thomistic perspective. Although there are one or two references to the *Digest*, the A's principal doctrinal sources are some of the great commentators on the 1917 code: Michiels, Roberti, Wernz-Vidal, Conte a Coronta, and Cappello.

The study is logically arranged in twelve short chapters, the first four of which provide fundamental definitions and descriptions: physical violence (15–23); moral violence and grave fear (25–37); reverential fear (39–41); the effect of fear upon juridic acts in general (43–49). The most substantial chapter (51–95) considers fear in the context of matrimonial consent: physical violence (51–54); extrinsic and intrinsic fear (54–70); reverential fear (71–76); methods of proof (76–79); fear and simulation (79–80). By way of addenda to this chapter, Navarette's 1972 argument for the invalidating effect of *intrinsic* fear upon matrimonial consent is presented (80–87), as well as the PCILT's 1987 affirmative response regarding the invalidating effect of extrinsic fear upon marriages of non-Catholics (88–95).

After the long chapter on marriage, four short chapters consider fear in the context of canonical elections (99–101), renunciation of office (103–105), choosing consecrated life (107–111), and vows and oaths (113–115). The A. then considers (117–137), in the context of penal law: physical violence (117–122); fear (122–131); diminished imputability (131–134); the judge's discretion in the application of penalties (134–136); penalties remitted through extortion (136–138). Finally, a short note regarding the invalidating effects of grave fear upon judicial confessions and sentences is included (139–141).

It should be noted that the work is strictly *doctrinal* in nature; aside from one or two passing references to sentences of the Roman Rota, jurisprudence is not considered. Although a bibliography would have been appreciated,

there is an index of names which facilitates finding the full reference to an abbreviated citation. All things considered, this handsome *opusculum* is a fine introduction to the subject.

Brian T. AUSTIN, F.F.S.P.

DREISBACH, Daniel L., and Mark David HALL (eds.), *Great Christian Jurists in American History*, Cambridge, Cambridge University Press, 2019, 336 + xxii p. – ISBN 978-1-10-847535-8 – US \$130.00

This fourth volume in the Cambridge University Press series on Great Christian Jurists is clearly set apart from its predecessors in format as well as subject matter. It is the only volume to appear thus far without a bibliography, even a select one, for any of the subjects. This is a pity, because the literature not only on some of the figures discussed, but also on some of the topics surveyed (the Puritan movement in New England and the Great Migration, the drafting of the US Constitution and Bill of Rights, as well as the storms that have swirled around the free exercise and establishment clauses, to say nothing of *Roe v. Wade*) is massive and diverse, and some suggestions on how to treat each essay as the beginning of a discussion rather than as the end of one would have been welcome.

The other difference is that this is the only volume to include living persons, or persons who were alive when the book was published. Bypassing the classical warning to “count none a happy man before he die” (Hecuba in Euripides’ *Troades* 510; cf. Croesus in Herodotus I.86), the temptation to rely on press reports and interviews (to which Justice Antonin Scalia’s presentation seems to be quite prone) risks leaving the evaluation of the figure incomplete and fragmentary. It may, of course, be necessary to fill out the number of essays with living jurists since, unlike the volumes on England, Spain, and France, it is impossible to review American legal writers from eight hundred years ago.

The selection process for these seventeen topics also seems peculiarly American – the editors took a poll of their colleagues, and selected the most popular nominations, perhaps so that the results could be manipulated to include tokens of diversity. Still, these essays have (for the most part) placed the figure being scrutinised in a much broader context than simply a warmed-over law review article.

Two interesting highlights come to mind from this collection, one from the beginning and the other from the end. Glenn Moots’ discussion, almost like Plutarch’s *Parallel Lives*, of John Cotton and Roger Williams manages

to compare and contrast them without falling into anachronism or evaluating them solely on the basis of twenty-first century sensibilities. In this Moots must be, if not unique, at least highly unusual, in that he avoids a drooling canonisation of Roger Williams or pillorying John Cotton; he notes that these, particularly the rapturous adulation of Williams, are the reactions of modern scholars, virtually without exception.

But one issue sidestepped in this consideration is why American law and jurisprudence almost from the very beginning developed such a different flavour and trajectory from English law. The Mayflower Compact, whose four hundredth anniversary is commemorated this year, consciously spoke of a “civil body politic” (although the words echo those of John Calvin, and the source of this civil body is a religious covenant), while the Colony of New Plymouth inaugurated civil marriage well over a century before it was legal in England, and this was repeated in all of the other colonies. But civil marriage was still quite definitely religious. In the colonial period, it is challenging to distinguish between “Christian,” “ecclesiastical,” and “religious,” assuming that these can be distinguished at all, and that makes clarity difficult. Why this should be so is a study all by itself.

The other highlight is in the essay on John Noonan. Charles Reid’s essay is filled with biographical details, and it is perhaps inevitable, given American history and law, that while each of the other volumes in this series contains considerations of canon lawyers and canonical scholars, Noonan is the only figure in this volume that could remotely be given that association. Although a number of scholars, such as Stephan Kuttner, the man rumoured to know everything, spent most of their professional lives in the United States, their work on canon law and legal history was probably unknown to the colleagues who made the selection, but Noonan, as scholar and writer, teacher, and Reagan appointee to the infamous Ninth Circuit of the Court of Appeals, would have been squarely in their sights. Reid focusses on *Persons and Masks of the Law: Cardozo, Holmes, Jefferson and Wythe as Makers of the Masks* (1975), Noonan’s principal work on jurisprudence, but canonists probably know him more for other works which, while mentioned, are given less prominence. Chief among these are the meticulously researched *Contraception* (1968), which ties in with the pontifical commission leading up to *Humanae Vitae* on which Noonan himself served, *Bribes: The Intellectual History of a Moral Idea* (1984), and *Power to Dissolve* (1972), on the courts of the Roman curia over the last five centuries. Reid links the latter work to Pope Francis’ *Amoris laetitia*, a connection which may be more Reid than Noonan. Noonan’s decisions, while numerous, are also somewhat bypassed. Also bypassed, undoubtedly for reasons of brevity, is the massive collection

of other works, mostly in journals and many with tantalising titles such as “Gratian Slept Here,” on a broad expanse of historical topics of canon and ecclesiastical law. While focussing on Noonan as a canonist or mediaeval legal historian would probably have extended the essay far beyond its necessary word limits, it is encouraging to see these subjects even in a work on American lawyers.

W. Becket SOULE, O.P.

DESCAMPS, Olivier, and Rafael DOMINGO, (eds.), *Great Christian Jurists in French History*, Cambridge, Cambridge University Press, 2019, 485 + xviii p. – ISBN 978-1-10-848408-4 (hb) – \$125.00

Among the many over-wrought statements in his *Essay on the Re-establishment in France of the Order of Preachers* (1839), Henri Lacordaire asserts that it “is remarkable that most of the founders of great religious orders, even though they were not French, came to France to lay there the foundations of their institutions,” citing as support for this Columbanus, Bruno, Norbert, Dominic, and Ignatius Loyola. This exaggerated French patriotism (isn’t the word “chauvinism” French?) is not absent from the recent addition to the Great Christian Jurists series, the third volume published by Cambridge University Press “to illustrate the fertile interactions and lasting synergies between Christianity and law in French history” (1).

While the other volumes in this series have been careful, at times self-consciously so, to identify the “Christian” component of the figures presented, so that term may have become quite attenuated (as, for example, in the case of Frederic Maitland), in this volume the larger questions arise over the use of the term “jurist.” While the usage is clear in the case of the mediaeval canonists (Ivo of Chartres, Stephen of Tournai, William Durandus), later scholars and politicians (Robert Schuman, one of the “founding fathers of the European Union,” Paul Fournier, Gabriel LeBras), and even Robert-Joseph Pothier, the “Oracle of Orléans,” and Jean-Étienne Portalis, the influential Gallican and Freemason in the period of the Napoleonic Civil Code and Concordat, it is startling to see included among “jurists” here John Calvin, Alexis de Toqueville and Jacques Maritain. The twenty-seven essays in this volume, by far the largest in number and length from this series to appear thus far, are certainly wide-ranging and diverse.

Some of the essays, such as Christof Rolker’s excellent presentation on Ivo of Chartres, are written by scholars who have spent decades pondering their figure’s writings and historical context; Rolker’s discussion of the

composition and ordering of the three works attributed to Ivo is clear and judicious. Others are disappointing – the thirteenth century Jacobus de Ravanis (Jacques de Revigny) is treated merely as a springboard to discuss the scholastic method. There is not a single quotation from any of his writings, and those works are listed, in summary fashion, in one, long, single sentence; on the other hand, there are *lengthy* quotations about “dialectic” and other characteristics of the mediaeval university curriculum from secondary surveys of the period. Kenneth Pennington’s wonderful essay on Stephen of Tournai shows how much can be done, and done well, in presenting a figure most of whose works remain in Latin, and in manuscript.

The essays on Paul Fournier and Gabriel LeBras raise an interesting question about canon law, particularly when compared to the other Christian jurists. In Spain, and certainly in England, canon law survived the Reformation as a practical occupation, and advocates, judges, and teachers can be identified and studied; as presented in the essays on Fournier and LeBras, canon and ecclesiastical law was principally a scholarly activity in the university, associated primarily with history and “religious sociology.” While both were certainly involved in the interplay between church and state that is never far from the surface in French politics, neither was a “practising” canonist, and while both are quite justly celebrated in academic circles, their influence in other areas appears to be glossed over, perhaps because sources identifying their activity would be hard to come by. Gabriel LeBras, for instance, served as an adviser for religious affairs for the Ministry of Foreign Affairs after 1945, and exercised a pivotal role in the appointment of bishops in that period, trusted by both church and state. Paul Fournier’s difficulty in accepting the French Third Republic and desire for peace during the period of the “Toast of Algiers” and the *Ralliement* is portrayed in moving terms, particularly in the face of apparent betrayal by the Holy See, but the absence of citations (to correspondence, publications, or even personal reminiscences) makes it difficult to follow up.

Calvin’s presence in this collection is intriguing. He certainly trained as a lawyer – his father was a canon lawyer! – and he named his most famous work the *Institutes of the Christian Religion*, in an echo of that classical legal text, the *Institutes* of Justinian. The essay, written by Emory University’s John Witte, is (for the most part) taken from Witte’s other works on law and religion in the Reformation and in Geneva. But Calvin has left hundreds of *consilia* (legal opinions), and it would be interesting to consider what Calvin’s legal training actually was, how it appeared, or did not appear, in his later writings, and how, or if, Calvin the jurist can be distinguished from Calvin the theologian.

There are, however, two serious deficiencies in this volume, which are not shared by the other volumes in this series. The first is the result of the publication of several of the essays in a language other than the author's native tongue. Some of the prose is turgid to the point of obscurity, some sentences lack verbs, and in some cases it is necessary to translate the English into French (or even German!) for it to make sense. The volume could have also benefitted from a more thorough proofreading (reference "Gabriel Le Blas").

The second deficiency is in the bibliography appended to most, but, alas, not to all of the essays. The advantage of a select bibliography at the end of an essay should be to direct the reader who wishes to go deeper or to learn more, either to the primary works of the author himself (in the original or in translation, if such exist) or to significant secondary considerations. In many cases, no works by the author under discussion are listed, and the secondary sources, probably constrained by space, are highly limited and selective.

The editors' introduction concludes, paradoxically, with a discussion of how *laïcité*, linked to religious freedom, "is a distinctly Christian idea" (17), and would have been impossible in a country with non-Christian roots. This raises one final intriguing query: to what extent is a nation's history visible in, or the result of, the specific trajectory of its legal culture? The French Revolution, perhaps the single most important event in French legal history, is relegated to one paragraph in the introduction, although numerous references are made in the biographies of those who lived through it. John Witte, in another work, briefly mused that there was a significant difference in the brutish violence of revolutions in Catholic countries (with the obvious reference to the French Revolution) when compared with Protestant countries in general, and those which had imbibed the Reformed tradition in particular. It is certainly not the case that countries developing a robust Reformed tradition of theology have avoided either revolution or violence, but there is a marked difference between the French Revolution, the Spanish Civil War, and the revolutions in South America on the one hand, and the English Civil War, the Glorious Revolution of 1688, or developments in the Netherlands on the other. But that may not be a question which could either be asked or answered by a Frenchman.

W. Becket SOULE, O.P.

Auteurs des recensions de cette livraison — Reviewers for this issue

W. Becket SOULE, O.P. is associate professor of canon law at Saint Paul University, Ottawa, ON, Canada.

Brian T. AUSTIN, F.S.S.P. is an independent scholar and chaplain at Saints Philomena and Cecilia Oratory in the Archdiocese of Indianapolis, Indiana (USA).

NOTES BIOGRAPHIQUES BIOGRAPHICAL NOTES

AUSTIN, Brian T., F.S.S.P.

Father Brian T. Austin, FSSP has studied at Vanderbilt University, St John's College, Annapolis (BA, Philosophy), Our Lady of Guadalupe Seminary (MDiv. equiv.), the University of Ottawa/St-Paul (MCL/JCL), and the Katholieke Universiteit Leuven (PhD/JCD). Since 2017, he has been a member of the CLSA's committee on institutes of consecrated life and societies of apostolic life. His doctoral dissertation, *The Power of the Congregation for the Doctrine of the Faith to Derogate From Prescription: An Evaluation of the Legality and Justice of the 2002 Rescript*, is forthcoming from Peeters (Leuven, 2020). In addition to his studies, he has been in parish ministry for eleven years and currently serves as chaplain to the Oratory of Saints Philomena and Cecilia in the Archdiocese of Indianapolis, Indiana (USA).

BLOOMQUIST, L. Gregory

Dr. L.G. Bloomquist is a full professor in the Faculty of Theology of Saint Paul University, in which he has taught since 1987. Before that, Prof. Bloomquist was visiting professor in the Facultat de Teologia de Barcelona – Seció Sant Francesc de Borja (SJ). He received his MA in Medieval Studies from the University of Toronto and his ThD from the Toronto School of Theology and the University of Toronto. His teaching and research center on rhetorical analysis and Biblical hermeneutics.

BOSSE, Armand

Le Révérend Père Armand Paul-Joseph Bosse est Docteur en Droit canonique et titulaire d'un Master en Jurisprudence et praxie ecclésiastique (Université Pontificale Urbanienne). Originaire du diocèse de Grand-Bassam en Côte d'Ivoire, depuis septembre 2017, il exerce en tant que Professeur chargé de cours auprès de la Faculté de Droit Canonique de l'Université Pontificale Urbanienne à Rome (Italie). Il est également membre de l'équipe des formateurs du collège Urbain (le Grand Séminaire du Dicastère de l'Évangélisation des Peuples).

GLYN, Justin, S.J.

Father Justin Glyn was born in Windhoek in Namibia in 1972. He obtained the BA (1992) and LLB (1995) degrees from the University of South Africa and practised as an attorney in South Africa from 1997-1998 and as a barrister and solicitor in New Zealand from 1999-2008, obtaining a Ph.D in law (administrative law and international law relating to refugees) from the University of Auckland in 2008. He entered the Society of Jesus in 2009 and, after obtaining the B.Theol (Hons) (2012) and Master of Theological Studies (2016) degrees from the University of Divinity (Melbourne), he was ordained a priest in 2016. He completed the Masters in Canon Law/JCL at Saint Paul University, Ottawa, in 2018. He is currently a lecturer at Catholic Theological College (University of Divinity - Melbourne) and an Australian Lawyer (admitted to civil practise), working as General Counsel to the Australian Province of the Society of Jesus.

HUELS, John M.

John M. Huels was born in St. Louis, Missouri on 13 November 1950. His studies include: B.A. in psychology and philosophy from St. Louis University, St. Louis, Missouri, 1971; M.A. in theology, M.Div. from Catholic Theological Union, Chicago, Illinois, 1976; J.C.D. from The Catholic University of America, Washington, D.C., 1982. He has been assistant professor (1982-1985) and associate professor (1988-1997), Catholic Theological Union, Chicago, Illinois, judge, Provincial Court of Appeals, Province of Chicago, 1986-1995; associate professor (1997-2000) and full professor (2000-2018), Faculty of Canon Law, St. Paul University, Ottawa, Ontario, where he served as president of the Professors' Association (2008-2012, 2015-2018).

LASCHUK, Alexander M.

Father Alexander Laschuk is a priest of the Eparchy of Toronto and Eastern Canada. Education: B.F.Sc. (Windsor, 2007), B.Th./S.T.B. (Saint Paul, 2010), M.C.L. (Saint Paul, 2011), J.C.L. (Saint Paul, 2012), J.C.D., Ph.D. (Saint Paul, 2016). Judicial Vicar and *economus* of the Eparchy of Toronto. Judicial Vicar of the Archdiocese of Toronto and the Toronto Regional Tribunal. Parochial vicar of St Nicholas Ukrainian Catholic Church (Toronto). Sessional lecturer at Saint Paul University since 2011 and the University of St Michael's College since 2017.

MACLELLAN, C.S.J., Bonnie

Sister Bonnie MacLellan, C.S.J. is currently serving as General Superior of The Sisters of St. Joseph of Sault Ste. Marie and Director of the Centre

for Canonical Services, Saint Paul University. Sister Bonnie is a Registered Nurse and Canadian Certified Health Care Executive. She obtained a Master of Public Health from the University of Minnesota, a PhD in Human and Organizational Systems from The Fielding Institute, Santa Barbara, CA, and a J.C.L. (2013) and J.C.D. (2017) from Saint Paul University. Her dissertation topic was Maintaining Catholic Identity in Catholic Sponsored Health Care Organizations in Ontario, Canada. She serves as an Adjunct Professor in the Faculty of Canon Law and is a member of the Board of Governors, Saint Paul University.

MENSAH, Jean-Claude

L'abbé Dr Dr Jean-Claude K. MENSAH, canoniste et historien Togolais, incardiné depuis 2002 au diocèse de Kpalimé, est en 2020 en paroisse dans l'archidiocèse de Chambéry, tout en étant Juge-auditeur à l'Officialité inter-diocésaine de Lyon et Enseignant au *Studium* de Droit canonique de Lyon. En décembre 2016, il a soutenu en France sa double thèse sur le dossier difficile des indulgences, sous la co-direction des Professeurs François Jankowiak et Jean Paul Durand op : doctorat en Droit de l'Université Paris-Saclay (Faculté de Droit Jean Monnet) et doctorat en Droit canonique (Faculté de Droit canonique de l'Institut catholique de Paris). Il a publié sur ce dossier un article dans le tome 58 (2017) de *L'année canonique* ; le Cerf publie de Jean-Claude Mensah en 2020 un vaste livre sur l'évolution du sacramental des indulgences, ainsi qu'un livre pastoral sur l'indulgence et la miséricorde divines.

NKOUAYA MBANDJI, S.J., Valère

Valère Nkouaya Mbandji est un prêtre jésuite originaire du Cameroun. Il est titulaire d'une licence en droit civil de l'Université de Yaoundé II, d'une licence en droit canonique de l'Université Pontificale Grégorienne de Rome et d'un Doctorat en droit canonique (Ph. D) de l'Université Saint Paul d'Ottawa. Il est professeur assistant de droit canonique à l'Université Saint Paul au Canada. Il est l'auteur de *La prescription canonique des délits sexuels sur des personnes mineures*, Éditions Lethielleux, Paris, 2018.

RENKEN, John Anthony

Monsignor John Anthony Renken, P.H., was born in Carlinville, Illinois on January 18, 1953. He holds a B.A. in Philosophy (Cardinal Glennon College, Saint Louis, 1975); M.A. in Civil Law (University of Illinois, Springfield, 1988); S.T.D. in Dogmatic Theology (Pontifical University of Saint Thomas Aquinas, Rome) and J.C.D. (Pontifical University of Saint Thomas Aquinas, Rome, 1981). He was ordained a priest by Saint John Paul

II on 24 June 1979. He served in multiple positions in the Diocese of Springfield in Illinois: parochial vicar, co-pastor, priest-moderator, vice-chancellor, chancellor, episcopal vicar and moderator for canonical affairs, vicar general, moderator of the curia, judicial vicar, director of the permanent diaconate. He was president of the CLSA (1999-2000); chair of the committee for the 1999 CLSA translation of the CIC; advisor to the USCCB Committee on Canonical Affairs (2003-2005); visiting professor of canon law in the summer JCL program at The Catholic University of America (1989-2006). He has lectured widely and his articles appear in many canonical journals. In 2007, he joined the Faculty of Canon Law, Saint Paul University, Ottawa, where he is now Dean and full professor.

RUDINSKAS, Aurimas P.

Father Aurimus P. Rudinskas was born in Klaipeda, Lithuania on 29 May 1979. His university studies are: The Catholic University of America, Washington, DC (B.A., [Philosophy], 2002); Université Catholique de Louvain, Belgium (B.A. [Theology and religious sciences], 2005); Katholieke Universiteit Leuven, Belgium (M.A. [Philosophy], 2008); Saint Paul University (J.C.L., 2019); University of Ottawa (Master of Canon Law, 2019). Currently, he is pastor of Our Lady of Mercy Parish, Hamilton, Ontario, Canada.

SOULE, W. Becket, O.P.

Father W. Becket Soule, O.P. graduated from Davidson College in Davidson, North Carolina before attending the Episcopal Divinity School in Cambridge, Massachusetts; he has also received degrees from the University of Dallas and Harvard University. He was ordained in the Episcopal Church in 1981, and served parishes in North Carolina, Texas, and Pennsylvania. After being received into full communion with the Catholic Church, he entered the Dominican Order and was ordained in the Catholic Church in 1993. He received the JCL (1992) and JCD (1994) from The Catholic University of America; his work centered on the Anglo-Norman school of canonists. Father Soule has taught at The Catholic University of America, the Dominican House of Studies (Washington, DC), and Oxford University. He has been visiting lecturer and fellow at other institutions of higher studies in the United States, Great Britain, and the Ukraine, and served as an official for the Congregation for the Eastern Churches in Rome. He was named the Bishop James A. Griffin Professor of Canon Law at the Pontifical College Josephinum in January 2011, after serving as Dean of the Pontifical Faculty at the Dominican House of Studies in Washington, D.C. (2003-2007) and pastor of Saint Denis' Catholic Church in Hanover, New Hampshire (2008-2010). He has also

served as Judicial Vicar and Episcopal Vicar for Canonical Affairs for the Personal Ordinariate of the Chair of Saint Peter (US and Canada). Since 2019, he is associate professor of the Faculty of Canon Law, Saint Paul University, Ottawa.